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SUPREME COURT, U.S.

No. 73-751

In the Supreme Court of the United States

October Term, 1973

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE,

Petitioners,

v.

LLOYD F. EARLY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTEENTH JUDICIAL CIRCUIT COURT, BROWARD COUNTY, STATE OF FLORIDA

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LLOYD F. EARLY,

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PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTEENTH JUDICIAL CIRCUIT COURT, BROWARD COUNTY, STATE OF FLORIDA

Petitioners, Palm Beach Newspapers, Inc., a Florida corporation, Gregory E. Favre, R. H. Kirkpatrick, Tom Sawyer and Jane Arpe, pray that a Writ of Cer-

tiorari be issued to review the orders of the Seventeenth Judicial Circuit Court, Broward County, State of Florida, entered in the above-entitled case.

OPINIONS BELOW

The opinion of the District Court of Appeal, Fourth District, State of Florida, is reported at 274 So.2d 890 (Appendix "G"). The opinion of the Florida Supreme Court refusing to review said decision is not yet reported. It is attached as Appendix "J".

JURISDICTION

The orders of the Circuit Court, Broward County, Florida, sought to be reviewed here, were dated August 8, 1972 (Appendix "C"), and August 28, 1972 (Appendix "D"). The order of the District Court of Appeal, Fourth District, State of Florida (Appendix "G"), upholding the circuit court decisions, was dated and entered on March 16, 1973. Rehearing was denied on April 10, 1973. The order was made final by an order of the Supreme Court of Florida dated July 10, 1973 (Appendix "J") On October 11, 1973, the Supreme Court of Florida refused to rehear its order-opinion of July 10, 1973, and dismissed the case for alleged lack of jurisdiction. (Appendix "K"). Petitioners were granted thirty days to seek review in this Honorable Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257. The orders of the state court violate the rights of petitioners guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Under these circumstances, the Writ of Certiorari runs to the Seventeenth Judicial Circuit Court, Broward

County, State of Florida. See *Interstate Circuit, Inc. v. City of Dallas,* (1968), 390 U.S. 676; *Michigan-Wisconsin Pipe Line Co. v. Calvert* and *Panhandle Eastern Pipe Line Co. v. Calvert,* (1954), 347 U.S. 157; *American Railway Express Co. v. Levee* (1923) 263 U.S. 19; and *Stern & Gressman,* Supreme Court Practice, Third Edition, Sec. 3-5, page 69.

It was first necessary to seek review by the Florida Supreme Court before filing Petition for Certiorari in this Court. See *Banks v. California* (1969) 395 U.S. 708.

NOTE 1:

Florida Statutes Section 59.45 provides:

"59.45. Misconception of remedy; supreme court. - If an appeal be improvidently taken where the remedy might have been more properly sought by certiorari, this alone shall not be a ground for dismissal; but the notice of appeal and the record thereon shall be regarded and acted on as a petition for certiorari duly presented to the Supreme Court."

By petition for Rehearing and earlier brief, it was pointed out to the Florida Supreme Court that in addition to the erroneous ruling by the state court on the Constitutional question, reviewable on appeal, the ruling here is further reviewable on "conflict" certiorari.

Accordingly, in the Petition for Rehearing, it was again prayed that the Florida Supreme Court review either on appeal or by certiorari. The Supreme Court of Florida denied the Petition for Rehearing and refused to take jursidiction.

Accordingly, Petitioners here have exhausted their remedies for review in the Courts of Florida and their only recourse now is in the Supreme Court of the United States.

As stated in *Evans v. Abney,* 396 U.S. 435 (1970):

"No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated"

QUESTIONS PRESENTED

1. Does a state court order which requires newspaper Petitioner to produce its Treasurer for the purpose of deposition under penalty of contempt and to produce for inspection and copying its confidential financial records, including balance sheets, profit and loss statements and Federal and state income tax returns deprive Petitioners of their Constitutional rights?

2. Does the state court order (affirmed by the District Court of Appeal) denying newspaper Petitioner's Motion to Strike the $2,000,000.00 punitive damage claim of Respondent, a public official, deprive Petitioners of their Constitutional rights?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States
Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S.C.A. Const. Amend. I

Amendment XIV:

". . . (N) or shall any State deprive any person of life, liberty or property, without due process of law . . ." U.S.C.A. Const. Amend. XIV Sec. 1.

FEDERAL STATUTES INVOLVED

26 U.S. Code, Sec. 6103 (Appendix "L") and 7213 (a) (Appendix "M")

These statutes provide for the confidentiality of returns and also provide for criminal penalties for unauthorized disclosures.

STATEMENT OF THE CASE

Respondent (plaintiff) Lloyd F. Early, an elected public official and then Superintendent of the Palm Beach County Public School System, commenced this libel action in August of 1970. Respondent alleged that a number of articles published from about June of 1969 through August of 1970 in the Palm Beach Post and Palm Beach Times newspapers, which were critical of his administration of the Palm Beach County Public Schools, were libelous of him. The Respondent further alleged that the articles were false and were published with knowledge of their falsity or with reckless disregard of their truth or falsity. The complaint seeks compensatory damages in excess of $1,000,000.00 and punitive damages in excess of $2,000,000.00, and demanded a trial by jury. In the early stages of the lawsuit, on motion by Respondent the case was transferred from the Fifteenth Judicial Circuit Court in Palm Beach County to the Seventeenth Judicial Circuit Court in Broward County, both state courts.

The Petitioners, during the pre-trial stages of the lawsuit, moved for summary judgment in the state court on the grounds that the articles complained of were not published with actual malice under the rule of *New York Times v. Sullivan,* 376 U.S. 254 (1964), which of course is the decision of this court and is applicable to libel actions by public officials. The court ruled on May 27, 1971, that many of the articles complained of were not libelous; the court, however, held that the Petitioners had not carried the burden of affirmatively showing an absence of actual malice. (Appendix "A"). Upon rehearing, the court again denied the motion for summary judgment as to actual malice. The court's

opinion and order did not cite the decision of this Honorable Court, which had been handed down six weeks earlier: *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971), which held that in cases of this kind, the plaintiff has the burden of demonstrating actual malice by clear and convincing evidence. 403 U.S. at 52.

The Respondent had commenced discovery on August 24, 1970, by serving written interrogatories upon the President of Petitioner, Palm Beach Newspapers, Inc. The interrogatory is as follows:

> "Interrogatory No. 51. If Defendant is a separate corporation, then state the following:
>
> A. The valuation of the assets, breaking same down into real estate, personal property and intangibles.
>
> B. The liabilities of said corporation.
>
> C. The net worth of said corporation.
>
> D. The income of said corporation for the years 1967, 1968 and 1969 to date.'

In response to Interrogatory No. 51, the Petitioner newspaper furnished Respondent a sworn statement by its Treasurer summarizing its total assets, liabilities and net worth for its fiscal years 1969, 1970 and 1971. These sworn statements show for those years, respectively, a net worth of $12,144,686.00; $12,753,649.00; $14,089,560.00. Respondent then served Petitioners with a notice of taking deposition of the Treasurer of

Petitioner newspaper, and served a subpoena duces tecum upon the Treasurer requiring him "to bring into court with you the following, to-wit: all books, account books and records, including any net worth and profit and loss statements of the Defendant, Palm Beach Newspapers, Inc. since its incorporation in 1969 to the present time."

Whereupon, on August 1, 1972, Petitioners' motion was heard, and the Court ordered that the Treasurer submit himself to deposition and bring with him *all profit and loss statements and balance sheets from the date of the inception of the corporation to the date of the deposition,* to-wit: August 2, 1972. Thereafter, on August 3, 1972, the Petitioners filed a motion for continuance of the deposition and again filed a motion for protective order and to quash subpoena duces tecum. The Petitioner newspaper again filed a motion for protective order and a motion to strike the punitive damage claim contained in Respondent's Complaint.

On August 8, 1972, the Court entered an order which included the following:

> "3. That Plaintiff's Motion to Produce filed before the Court on August 8, 1972, will be granted and the Defendant-Palm Beach Newspapers, Inc., is hereby ordered to produce on Friday, August 11, 1972, at 2:00 P.M. at 520 Pan-A Building, West Palm Beach, Florida, before David Finley, Notary Public, for inspection and copying (a) its detailed balance sheet or statement of net worth for the periods 1969, 1970, and 1971 (b) its profit and loss statement for 1969, 1970 and 1971, the latter being deemed to include any operating statement of profit

> and loss of the defendant corporation regardless of the title or formal designation which it might bear (c) the corporate federal and/or state tax returns for 1969, 1970 and 1971 of the defendant corporation."

On August 28, 1972, the Court also denied Petitioners' motion on constitutional grounds to strike plaintiff's claim for punitive damages.

Thereafter, on September 6, 1972, Petitioners filed a Petition for Writ of Certiorari and a brief in support thereof in the District Court of Appeal, Fourth District, State of Florida, seeking to review the two pre-trial orders of the state circuit court.

On September 8, 1972, Respondent filed a motion to quash petition for writ of certiorari. On October 10, 1972, the motion to quash was granted by the District Court of Appeal, Fourth District. Petitioners timely filed a petition for reconsideration and a petition for rehearing (Appendix "E") of the granting of the motion to quash. On October 16, 1972, the Court granted the petitions for reconsideration and rehearing. (Appendix "F").

On March 16, 1973, the District Court of Appeal, Fourth District, issued an opinion, per curiam, which is set forth below in its entirety:

> "The petition for writ of certiorari seeking review of an order denying defendants' motion to strike the claim for punitive damages, and an order which denied in part defendants' motion for pro-

tective order, is denied without prejudice to petitioners' right to have such matters reviewed upon full appeal if properly assigned and argued.

"REED, C.J. and CROSS, J., concur. OWEN, JR., concurs in part and dissents in part.

"OWEN, JR., concurring in part and dissenting in part.

"I would grant certiorari as to that portion of the order denying the defendants' motion for protective order which required the corporate defendant to produce for plaintiff's inspection and copying such defendant's profit and loss statement and its corporate federal income tax returns for the years 1969, 1970 and 1971, respectively, on the basis that such defendant's income was not in issue and was not a proper subject for discovery. Cf., Ernst & Ernst v. Reedus, Fla.App.1972, 260 So.2d 258." (Appendix "G").

A petition for en banc rehearing was filed by Petitioners on March 28, 1973, and denied by the District Court of Appeal, Fourth District, State of Florida, by order dated April 10, 1973 (Appendix "H").

A Petition for Certiorari and brief in support thereof in the Supreme Court of Florida were filed on April 23, 1973. The Petition sought review of the decision of the District Court of Appeal. Also, a direct appeal was filed on May 14, 1973, and the appeals were consolidated on May 16, 1973. Thereafter, on July 10, 1973, the Supeme Court of Florida denied certiorari and dis-

missed the appeal, and issued an order thereon. (Appendix "J")

REASONS FOR GRANTING WRIT

The orders of the trial court constitute a violation of the letter and spirit of *New York Times v. Sullivan* (1964) 376 U.S. 254, and succeeding cases, particularly *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971).

The Federal questions sought to be reviewed were raised in the court of first instance by Petitioners' motion for protective order and to quash subpoena duces tecum, filed in the trial court (Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County) on August 3, 1972 (Appendix "B"). This motion was filed in an effort to prevent discovery of the financial matters previously alluded to. The motion contained various grounds, but in paragraph 7, Amendments I and XIV to the Constitution of the United States were specifically urged.

Also, in the trial court, the Federal question was raised by Petitioners' motion to strike, filed August 8, 1972. The motion was based upon the First Amendment case of this Court, *New York Times v. Sullivan,* supra.

The state trial court denied the motion for protective order and to quash subpoena duces tecum and the motion to strike, (Appendices "C" and "D"), said orders being dated August 8, 1972, and August 28, 1972, respectively. It was from these orders that a Petition for Writ of Certiorari was timely filed to the District Court of Appeal, Fourth District, State of Florida. Again, the

Federal questions were strenuously argued in Petitioners' Petition for Writ of Certiorari and supporting brief, and the brief of amicus curiae. The petition for rehearing (Appendix "E") also raised the pertinent Federal questions.

Once again, the Federal questions were raised in Petitioners' Petition for Writ of Certiorari and supporting brief, and the brief of amicus curiae in the Supreme Court of Florida. The assignments of error filed in the direct appeal to the Supreme Court of Florida cited the Federal questions sought to be reviewed (Appendix "I").

ARGUMENT

It is submitted that the Seventeenth Judicial Circuit Court, Broward County, State of Florida, has decided a Federal question of substance in a way not in accord with applicable decisions of this Court and not theretofore determined by this Court.

The ruling of the Florida court does not properly apply the Federal Constitutional law. The Respondent in the instant case is a public official; therefore, this is a First Amendment case. In numerous First Amendment cases, the Courts have recognized that the litigation process itself may have a Constitutionally and impermissible chilling effect on freedom of expression. If a newspaper, for example, must face the prospect of protracted litigation each time it publishes articles on controversial subjects, the newspaper might tend to begin avoiding controversies, and printing only bland, "safe" matter. The result would be to stifle the free flow of information our society has so long cherished. There-

fore, the courts have struck down deterrents to free publication whose "chilling effect" would tend to induce self-censorship.

In *New York Times v. Sullivan,* supra, the principal reason for the doctrine announced therein was to provide more "elbow room" for free expression on subjects of public interest.

> "Would-be critics of official conduct may be deterred from voicing their criticism even though it is believed to be true and even though it is in fact true because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which steer far wider of the unlawful zone. *Spizer v. Randall,* supra, 357 U.S. at 526.
>
> The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *New York Times v. Sullivan,* 376 U. S. at 279.

Justice Brennan of this Court, in *Rosenbloom v. Metromedia,* restated this principle:

> "The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to steer far wider of the unlawful zone, thereby keeping protected discussion from public cognizance. *Spizer v. Randall,* 357 U.S. at 526, 2 Law Ed. 2d at 1473, 43 U.S. at 52-53."

If a public official plaintiff in a libel action against a newspaper is allowed, simply because he alleges punitive damages, to obtain access to the confidential financial affairs of the newspaper, it would result in precisely the "chilling effect" that the *New York Times v. Sullivan* doctrine was designed to prevent. Even in cases not involving the First Amendment, litigants are protected from harassing discovery, but in First Amendment cases, the Constitutional protections of *New York Times v. Sullivan* will be destroyed if broad discovery of confidential financial matters, including United States income tax returns, are forced from a newspaper defendant.

The State court was in error when it failed to grant Petitioners' motion for summary judgment. The denial of the motion for summary judgment is not appealable by way of interlocutory appeal according to Florida procedural rules. The Respondent, notwithstanding the fact that he has been furnished a net worth statement entirely adequate for his alleged purposes, seeks to harass your Petitioner newspaper by seeking to depose its Treasurer on matters of financial detail.

As a general rule, the financial circumstances in any action is immaterial and discovery in this area would be barred. Punitive damage cases in Florida courts are treated as an exception to this general rule; the rule usually being that if any punitive damages are, in fact, to be awarded, the wealth of the defendants may be considered in determining the amount of punitive damages to be assessed. *Lewis v. Moody,* 195 So.2d 260 (Fla.D.C.A. 1967). In this particular instance, a public official plaintiff is involved and as such, as this Court has said many times, must pass an extremely stringent

test to impose liability upon a newspaper for publications critical of the official's public actions, even if the publisher eventually wins on the merits. If he has been forced to spend substantial sums for defense and reveal his confidential financial affairs in the process, the "chilling effect" sought to be avoided by *New York Times v. Sullivan* and its progeny has, in fact, not been avoided. It would certainly appear that a more just result would be obtained by at least deferring discovery until this public official plaintiff proves actual malice by "clear and convincing evidence."

There are ample precedents for such deferrals of discovery. In Florida, in the case of *Charles Sales Corp. v. Robinger,* 88 So.2d 551 (1956), the court deferred discovery of the financial affairs of the defendant in an accounting action until the plaintiff established his right to the accounting. The New Jersey courts have established that discovery of the defendant's financial affairs has bearing on the issue of punitive damages in tort actions, such as libel and malicious prosecution, be conditioned upon the plaintiff making an affirmative showing of his right to collect punitive damages from the defendant. *Gierman v. Toman,* 77 N.J. Super. 18, 185 A.2d 241 (1962); *Warren v. Hague,* 11 N.J. Super. 311, 78 A.2d 300 (1951). The Court in the former case reasoned persuasively as follows:

> "There is no connection between a defendant's wealth and compensatory damages but there is such connection when exemplary damages are demanded. The obviously objectionable features of the present demand are invasion of a traditionally personal and private domain as well as inconvenience

of disclosing details. Strictly speaking, orderly procedure requires liability to be proved before damages are available. However, since pretrial discovery precedes proof, should a prima facie showing of the right to damages support such a demand? Defendant, even when successful in litigation, absorbs unrecoverable costs and inconvenience. While orderly procedure is preferable, deviation is a common practice. The exigencies of a trial require departure at times. However, where a right of a litigant to insist on orderly procedure raises a substantial question of prejudice, albeit of an intangible nature, the strict adherence to procedure seems called for where the character of the harm is irreparable. See *Handelman v. Handelman,* 17 N.J. 1, 10, 109 A.2d 797 (1954). Just and orderly procedure here requires that prima facie proof of the right to recover punitive damages should precede the right to a general disclosure of wealth; and as to specific details such as requested here, the rules furnished sufficient protection against abuse and harassment." 185 A.2d at 244.

Petitioner would reiterate that the Respondent has already received more than he is entitled to on the issue of financial condition. Respondent has received sworn statements showing the newspaper's assets, liabilities and net worth. This information furnished by Petitioners to Respondent is certainly the only aspect of the newspaper's financial status that is conceivably relevant. The Petitioner newspaper has admitted a net worth of approximately $14,000,000.00. Notwithstanding this disclosure, the lower court has required the production of the newspaper's Federal income tax returns

and other confidential information. The United States Statutes provide that Federal income tax returns be treated in strict confidence. Criminal penalties are provided for unauthorized disclosure. 26 U.S.C. Sec. 6103 Appendix ("L") and Sec. 7213 (a) Appendix ("M"). Except for cases in which the Government is a party, there is only one type of case in which a litigant's Federal income tax returns are subject to discovery: when the litigant himself has placed his income at issue. The most recent case in which this subject was analyzed is *Federal Savings and Loan Ins. Corp. v. Krueger,* 41 U.S.L.W. 2040 (U.S. D.C. N.Ill. July 12, 1972) where the Court gave the following reasons for denying plaintiff the right to discover defendant's federal income tax returns:

> "The Court has weighed the liberal discovery theories advanced in some cases against the protection of confidentiality provided by statute and believes in the instant case production by defendants is definitely not warranted. If this were a case where the taxpayer had made an issue of his income, such as claiming loss due to injury, there would be no question that he had waived the confidentiality of his returns and had thereby opened them up to scrutiny by his opponent. Unless a litigant himself makes an issue of his income, his income tax returns are not subject to discovery. Defendants here have not made an issue of their income. To compel the taxpayers themselves to furnish copies of their returns unless they have waived that right by making an issue of their income would be a subterfuge and defeat the very purpose of the statute." 41 U.S.L.W. at 2041.

CONCLUSION

For the reasons set forth hereinabove, this Petition for a Writ of Certiorari should be granted. Petitioners respectfully urge this Court to reverse the orders of the Seventeenth Judicial Circuit Court, Broward County, State of Florida, concurrently with its issuing the Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION

CASE NO,. 70 C 3600 Hewitt

LLOYD F. EARLY,

Plaintiff,

vs.

PALM BEACH NEWSPAPERS, INC., et al.,

Defendants.

ORDER

This cause was heard upon Defendants' motion, served April 9, 1971, for summary judgment.

A consideration of this file reveals that many of Defendants' news articles, editorials and cartoons of which Plaintiff complains, enumerated in the statement of particulars served January 20, 1971, clearly fail to constitute false and defamatory language. See *New York Times Co. v. Sullivan*, 84 S.Ct. 710 (1964); *Ocala Star-Banner Co. et al v. Damron*, 91 S.Ct. 628 (1971); *Garrison v. State of Louisiana*, 85 S.Ct. 209 (1964); *Monitor Patriot Co. v. Roy*, 91 S.Ct. 621 (1971); *Time, Inc. v. Pape*, 91 S.Ct. 633 (1971). As to these matters Defendants are entitled to a summary judgement as a matter of law. See Florida Rules of

Civil Procedure, Rule 1.510; *Page v. Staley,* 226 So.2d 129 (Fla.1969).

The issue of conspiracy can not be resolved by the Court on the motion for summary judgment because the motion places upon Defendants the burden to demonstrate affirmatively the absence of any facts and inferences that would create an issue of conspiracy. In the light of this record the Court is unable to conclude as a matter of law that there is a complete absence of a genuine issue of conspiracy and the motion for summary judgment on this issue must be denied. See Florida Rules of Civil Procedure, Rule 1.510. Thereupon, it is

ORDERED as follows:

1. Defendants' motion for summary judgment is denied as to portions of the Plaintiff's exhibit to Paragraph 3 attached to Plaintiff's statement of particulars, served January 20, 1971, appearing as Clerk's Entry No. 48, as follows:

Paragraph 1 in its entirety.

The following portion of Paragraph 2:

". . . but that confidence began eroding as the board observed his administration of the system."

"Privately alarmed at what members said they felt was mismanagement . . ."

"He (Below) was given instructions that he, not Early, was to manage the school system, providing the leadership which board members felt had been lacking." Parenthesis provided.

"Both Below and Early have been informed by at least three board members that the deputy is to call the shots."

". . . no reaction to the orders which leave him powerless."

" 'Do not forget,' one said 'that Mr. Early was never able to get a job as a principal.' ".

The following portion of Paragraph 4:

" 'Below is running this school system because you are incapable. Do not interfere with him' . . .".

Paragraph 5 in its entirety.

Paragraph 6 in its entirety.

The following portion of Paragraph 7:

"Now I understand why Russell Below is running our school system and Lloyd Early is not."

Paragraph 8 in its entirety.

The following portion of Paragraph 10:

"ITV isn't a tinkertoy for Mr. Early's private pleasure. He shouldn't be encouraged to dip his fingers further into the school system's soup when a more able man, appointed not elected, is striving to meet crisis situations."

"School board members, who wisely told Mr. Early to keep out of the way, Certainly can't play deaf, dumb and blind when he is messing up the works."

The following portion of Paragraph 16:

"Below, who currently is running the school system under orders from the School Board . . .".

The following portion of Paragraph 20:

"For instance, he spent most of last week visiting relatives along the East Coast but it won't show up on the school records."

"Two weeks ago, he went on a Republican trip to Washington, again on school time."

"Only when Early fills out expense vouchers to collect money for the 'official trips' he takes is there any record of where he goes."

Paragraph 21 in its entirety.

The following portion of Paragraph 22:

"While Below for all practical purposes runs the schools, Supt. Lloyd Early is legally the head of the system."

The following portion of Paragraph 24:

"Below was named deputy superintendent, a new post, when four school board members became alarmed at what they felt was a downhill slide the system was taking under Early."

"Reportedly, Early had promised Mrs. Jordan the job of assistant superintendent in return for her promise not to oppose him when he ran for the superintendency."

Paragraph 26 in its entirety.

The following portion of Paragraph 28:

"Below, brought here by the board when four members became alarmed at the school system's lack of leadership under Early, is under contract only until June."

The following portion of Paragraph 30:

"Certainly, Mr. Below has proved himself a capable leader since he was appointed in June to fill the void created by the weak and elected superintendent, Lloyd Early."

Paragraph 31 in its entirety.

Paragraph 32 in its entirety.

Paragraph 35 in its entirety.

Paragraph 36 in its entirety.

Paragraph 43 in its entirety.

The following portion of Paragraph 46:

"Whatever his good intentions and earnestness, Mr. Early is not qualified for the important job he holds. He offers soft platitudes instead of hard decisions. And at a time when this school system is plagued by critical problems ranging from an enrollment surge to enormous building needs, from inadequate financing to desegregation plans."

"Mr. Early's continuance in his job is becoming

more than an embarrassment. He now is standing in the way of a contract that can seal Mr. Below's services here. His indecisiveness is aggravating to both blacks and whites, militants and otherwise, trying to reconcile with a controversial desegregation plan."

"Certainly Mr. Early knows he is over his head. He ought to step down as graciously as his record will allow. Or, failing this, the governor, if he has his home county and its 68,000 school children at heart, ought to use his influence. At this juncture, anyone can see that more years of Mr. Early are a risk and liability that no political party could afford."

"And just a glance at the board's political infighting and Mr. Early's performance tells why."

The following portion of Paragraph 50:

"A big hurt in this hastily drawn and passed plan is that its sponsor, Mr. Early, couldn't even answer simple questions about it. His plan presentation was slick but his explanation of what he had presented came out mumble-fumble."

"Mr. Below, brought in because Superintendent Lloyd Early was incapable of doing his job, faces an effort on the part of two school board members -- Thelma Wymer and Robert Johnson -- and Mr. Early to send him packing. The other three board members have declared their public support for him."

"Mr. Early has proven himself as a very poor educational doctor at best."

The following portion of Paragraph 56:

"Mr. Early had about as much chance of sneaking that subterfuge by the HEW regional office as he would his TV program past the taxpayer censors."

Paragraph 59 in its entirety.

The following portion of Paragraph 61:

"Anyone can see through such an order. And anyone can see that making educational progress in county schools is difficult business with leadership sometimes as silly as it is shaky."

Paragraph 62 in its entirety.

Paragraph 65 in its entirety.

Paragraph 66 in its entirety.

Paragraph 67 in its entirety.

Paragraph 68 in its entirety.

The following portion of Paragraph 71:

"The school system is plagued by Mr. Early's poor leadership, senseless politics, school board infighting, finances, the desegregation issue, enrollment surges, construction needs. . . ."

Paragraph 76 in its entirety.

Paragraph 78 in its entirety.

Paragraph 80 in its entirety.

Paragraph 81 in its entirety.

The following portion of Paragraph 82:

"If Palm Beach countians didn't owe so much sympathy to children caught in the leaderless school system, they could almost shed a tear for Supt. Lloyd Early."

"Yes, a perfect example. No bed of roses for Mr. Early who is over his head. But, worse, all thorns for children who desperately need guidance at the top so that a good school system will evolve and prepare them for a highly competitive society that is far into the rocket age."

The following portion of Paragraph 83:

"Below was hired by the School Board last June because a majority of the board feels Early is an inept administrator."

"It was learned that Early's personnel changes were developed during the secret weekend meetings."

The following portion of Paragraph 84:

"Ironically, Below was brought into the system by a unanimous vote of the board, because board members said they were deeply concerned because of Early's aimlessness and lack of leadership."

The following portion of Paragraph 85:

"School Supt. Lloyd Early has taken his incredible ineptness one more step by sending dismissal letters to Deputy Supt. Russell Below and School Plant Planning Director Dan Stout."

The following portion of Paragraph 87:

"Palm Beach County Schools, lacking both leadership and money, are in serious trouble."

Paragraph 88 in its entirety.

Paragraph 90 in its entirety.

Paragraph 91 in its entirety.

Paragraph 92 in its entirety.

Paragraph 93 in its entirety.

Paragraph 94 in its entirety.

Paragraph 98 in its entirety.

Paragraph 99 in its entirety.

Paragraph 100 in its entirety.

Paragraph 103 in its entirety.

Paragraph 105 in its entirety.

Paragraph 107 in its entirety.

Paragraph 108 in its entirety.

In all other respects Defendants' motion for summary judgment is granted as to the exhibit to Paragraph 3 attached to Plaintiff's statement of particulars.

2. In all other respects Defendants' motion for summary judgment is denied.

Copy furnished counsel.

DONE AND ORDERED this 27 day of May, A.D. 1971.

s/ Robert S. Hewitt

ROBERT S. HEWITT,
CIRCUIT JUDGE

APPENDIX "B"

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY. CIVIL ACTION

Case No. 71-10447 - Richardson

LLOYD F. EARLY,

Plaintiff,

vs.

PALM BEACH NEWSPAPERS, INC., etc., et al.,

Defendants.

MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA DUCES TECUM

COMES NOW the Defendant, PALM BEACH NEWSPAPERS, INC., a Florida corporation, by and through its undersigned attorneys, and moves this Honorable Court to enter its Order limiting discovery at the deposition of RONALD L. ROSWELL to the net worth of the Defendant corporation, as has been furnished in compliance with Paragraph 1(c) of the Court's Order dated the 10th day of November, 1970. A copy of said Order is attached hereto as "Exhibit A", and a copy of Interrogatories 51 and 52 referred to in said Order is attached hereto as "Exhibit B". Also attached is a copy of the Answers to Interrogatories 51 and 52 as furnished counsel at the Pre-Trial Conference, and for grounds for the Motion to Quash

and Protective Order, and as substantial matters of law relied on, Defendant would show that the subpoena duces tecum served on Defendant's Treasurer, Ronald L. Roswell, commands him to appear with all books, account books and records, including any net worth and profit and loss statements of the Defendant, Palm Beach Newspapers, Inc., since its incorporation in 1969, to the present time.

1. Contrary to the Florida Rules of Civil Procedure and the law of Florida, no good cause has been set forth or shown for the production of said documents, books and records.

2. The documents, books and records are not described with the particularity required by the Florida Rules of Civil Procedure.

3. The scope and reach of the subpoena duces tecum is overly broad and unduly burdensome and oppressive, and an harassment to the Defendant, and not necessary to this litigation.

4. There is no showing of the existence or possession of the vaguely-described documents called for by the subpoena duces tecum.

5. The subpoena duces tecum exceeds and is in violation of the Court's Order of November 10, 1970, paragraph 1 (c). The extent of discovery permissible on this point was argued and determined by said Order, which has been fully complied with by the Defendant. The present attempt to re-open and expand discovery on this point is contrary to the prior Order of the Court, and represents a violation of the principle set

forth in Rule 1.340 (d) of the Florida Rules of Civil Procedure.

6. The reach of the request of discovery is excessive in that all relevant and material information has previously been furnished to Plaintiff in compliance with the Court's Order of November 10, 1970, as above set forth, and that Plaintiff has no right to the compulsion of the process of this Court for the purpose of conducting an audit in the form of a deposition of all of the details of Defendant's business and financial and economic affairs.

7. The documents called for are not subject to discovery under the Florida Rules of Civil Procedure, the Constitution of the United States, and the Constitution of the State of Florida in that the same are privileged against compulsory disclosure by Amendments I and XIV to the Constitution of the United States safeguarding, protecting and guaranteeing freedom of speech and of the press and the right to privacy, and by Article I, Section 4 of the Constitution of the State of Florida guaranteeing freedom of speech and of the press.

WHEREFORE, Defendants pray that this Honorable Court enter a Protective Order limiting the discovery as to financial worth to the information previously furnished counsel in compliance with the Court's Order dated November 10, 1970, and for an Order quashing the subpoena duces tecum.

I HEREBY CERTIFY that copies of the foregoing have been furnished FARISH AND FARISH, Attorneys for Plaintiff, 316 First Street, West Palm Beach, Florida, 33401, and HEUER AND ALBURY, Attor-

neys for Defendants, Suite 200, Pan-American Building, West Palm Beach, Florida, 33401, by hand delivery, this 3rd day of August, 1972.

RYAN, TAYLOR, BOOKER & LAW
Attorneys for Defendant
P.O. Box 14577
North Palm Beach, Florida 33408

By: /s/ JOHN F. LAW, JR.
Of Counsel

EXHIBIT A

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION

CASE NO. 70 C 3600 Hewitt

LLOYD F. EARLY,

Plaintiff,

vs.

PALM BEACH NEWSPAPERS, INC,.
a Florida corporation, et al.,

Defendants.

ORDER

This cause came on to be heard upon the objections to interrogatories served September 2, 1970. Upon stipulation of counsel, argument of counsel and a consideration of the file, it is

ORDERED as follows:

1. As to the objections to interrogatories directed to Robert Sherman as president of the Defendant corporation:

a. The Court approves the agreement that the interrogatories need not be answered by Robert Sherman and may be answered by an officer or agent of the corporation.

b. The Court approves the agreement that interrogatories 13 and 14 shall be limited so as to require information only as to the number of editions sold or delivered; said interrogatories are so amended; and the objections are otherwise overruled.

c. The Court approves the agreement that the information requested by Interrogatories 51 and 52 need not be made available to Plaintiff until the pretrial conference.

d. The Court approves the agreement that objections are withdrawn as to Interrogatories 9, 19, 26, 29, 30, 31, 32, 49, and the objections are therefore overruled.

e. The Court approves the agreement that the information requested by Interrogatory 33 shall be

limited to the time of filing of suit and the objection, as amended, is overruled.

f. Defendant's objections are sustained as to Interrogatory 12.

g. Defendant's objections are overruled as to Interrogatory 15.

h. Defendant's objections are sustained as to Interrogatories 20 through 24, both inclusive, for the reason that the interrogatories are too general and would impose an unnecessary burden upon Defendant.

i. Defendant's objection to Interrogatory No. 27 is sustained because the question is too general.

2. As to the objections to interrogatories directed to Defendants Favre and Kirkpatrick:

a. The Court approves the agreement that Interrogatories 14, 15 and 16 shall be modified so as to require information only as to the articles for which the respective Defendant is responsible, and with said modification, the objections are overruled.

b. The Court approves the agreement that Interrogatory 31 shall be modified to require information relating only to the articles for which each respective Defendant is responsible and the information within the personal knowledge of each Defendant. The objection to the interrogatory, as modified, is therefore overruled.

3. As to the objections to interrogatories directed to

Defendants Sawyer and Arpe:

a. The Court approves the agreement that Interrogatories 14, 15 and 16 shall be modified so as to require information only as to the articles for which the respective Defendant is responsible. The objections to Interrogatories 14, 15 and 16, as modified, are overruled.

b. The Court approves the agreement that the Interrogatories 20, 21, 25, 27, 28, 31, 32, 34, 35 and 41 are modified so as to require information from each Defendant for only the article for which the respective Defendant is responsible and within his personal knowledge. The objections to said interrogatories, as modified, are overruled.

4. The Defendants shall file the answers to interrogatories required hereunder within 30 days of the date of this order.

Copy furnished counsel.

DONE AND ORDERED this 10 day of November, A.D. 1970.

s/ Robert S. Hewitt
ROBERT S. HEWITT,
CIRCUIT JUDGE

EXHIBIT B

Interrogatory No. 47: Did you make an attempt to retract any matter contained in said publications.

Interrogatory No. 48: If so, state:

(a) Each media used to accomplish the retraction.

(b) The name and date of each newspaper or magazine in which any retraction appeared.

(c) The number of column inches devoted to each.

(d) Whether any headline or bold face type identified the article as an apology or retraction.

Interrogatory No. 49: State when and where Defendant corporation was organized.

Interrogatory No. 50: State if the Defendant corporation is a subsidiary of a parent corporation and if so, state the name, place and organization of said parent corporation.

Interrogatory No. 51: If Defendant is a separate corporation, then state the following:

(a) The valuation of the assets, breaking same down into real estate, personal property and intangibles.

(b) The liabilities of said corporation.

(c) The net worth of said corporation.

(d) The income from said corporation for the years 1967, 1968 and 1969 to date.

Interrogatory No. 52: If the Defendant corporation is a subsidiary of a parent corporation, then list the answers to each of the questions set forth in the foregoing interrogatory to said parent corporation.

Interrogatory No. 53: List the name and address of each person who has any knowledge of relevant facts and/or information of the circumstances of this case, setting forth concise statements as to precisely the information which each has within his personal knowledge.

/s/ JOS. D. FARISH, JR.
Jos. D. Farish, Jr.
Of Counsel

ANSWERS TO INTERROGATORY # 51

(A) Valuation of the assets by real estate, personal property and intangibles:

	At December 31, 1969
Real Estate	$ 100,000
Personal Property	5,402,927
Intangible	17,273,356
Total	$22,776,283

(B) The liabilities of the corporation:

	At December 31, 1969
Total liabilities	$ 10,631,597

(C) The net worth of said corporation:

	At December 31, 1969
Net Worth	$ 12,144,686

(D) The income from said corporation for the years

1967, 1968 and 1969 to date:

1967	-0-
1968	-0-
1969	$144,687

APPENDIX "C"

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

NO. 71-10447 Richardson

LLOYD F. EARLY,

Plaintiff,

-vs-

PALM BEACH NEWSPAPERS, INC., etc., et al.,

Defendants.

ORDER

THIS CAUSE came on to be heard upon the respective pending motions of both Plaintiff and Defendant-Palm Beach Newspapers, Inc., and the Court has considered the same, the argument of counsel and is duly advised in the premises.

Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. That Plaintiff's Motion to Compel Discovery bearing certificate date August 7, 1972, and filed before the court on August 8, 1972, will be granted in part and be denied in part.

The Motion is denied insofar as it seeks to compel the Defendant-Palm Beach to answer Interrogatory 52 as previously propounded since said interrogatory was the subject of the Court's prior order of May 31, 1972; and upon the further ground that Plaintiff is not entitled to inquire into the assets of the Cox Corporation, parent company of the defendant corporation.

2. That Plaintiff's Motion to Compel Discovery seeking an order compelling the witness, Ronald L. Roswell, Treasurer of the Defendant corporation, to be, appear and present himself for the taking of his deposition is granted, and the said Ronald L. Roswell, Treasurer of the defendant corporation, is hereby ordered to present himself for the taking of his deposition at the office of David Finley, a Notary Public, or some other notary, at 520 Pan-A-Building, West Palm Beach, Florida, at 2:00 P.M. on Friday, August 11, 1972, and fail not under penalty of contempt.

The aforesaid Motion to Compel Discovery is granted based upon the previous failure of the witness to respond to a subpoena duly served upon him July 28, 1972 by the Sheriff of Palm Beach County, Florida; and, further by reason of his having failed to respond to the notice of taking deposition previously filed in this cause with respect to the said treasurer of the defendant corporation.

3. That Plaintiff's Motion to Produce filed before the Court on August 8, 1972 will be granted and the Defendant-Palm Beach Newspapers, Inc., is hereby ordered to produce on Friday, August 11, 1972 at 2:00 p.m. at 520 Pan-A Building, West Palm Beach, Florida, before David Finley, Notary Public, for inspec-

tion and copying (a) its detailed balance sheet or statement of net worth for the periods 1969, 1970, and 1971 (b) its profit and loss statement for 1969, 1970 and 1971, the latter being deemed to include any operating statement of profit and loss of the defendant corporation regardless of the title or formal designation which it might bear (c) the corporate federal and/or state tax returns for 1969, 1970 and 1971 of the defendant corporation. In the event the defendant corporation is operating on a fiscal year basis as opposed to a calendar year basis, the items above set forth for the respective fiscal years should be produced.

This order is predicated upon the authority of the following cases: Orlowitz v. Orlowitz, Florida Supreme Court, 1967, 199 So. 2d 97; Parker v. Parker, Fourth District Court of Appeals, Florida, 1966, 182 So. 2d 498; Lewis v. Moody, Third District Court of Appeals, Florida, 1967, 195 So. 2d 260; Fryd Construction Company v. Freeman, Third District Court of Appeals, Florida, 1966, 191 So. 2d 487; together with the language of Rule 1.350, which makes available for inspection, copying or photographing by or on behalf of the moving party any designated papers, books, documents not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination within Rule 1.280(b).

The Court has also considered the cases bearing upon this issue as collected in the Annotation at 27 ALR 3d 1375, and is satisfied that the items herein ordered produced are reasonably calculated to lead to the discovery of facts which might be admissible at the time of the trial, to wit: the true net worth of the defendant corporation, should an award of punitive damages be

then proper under the facts and the law of the case at the time of trial.

4. The Defendant-Palm Beach's Motion for Order of Protection will be granted in part and denied in part.

Pursuant to the authorities previously cited, the defendant's motion will be granted to the extent that production will be ordered solely as to plaintiff and his counsel, and though the documents produced may be inspected, photographed or copied by the plaintiff and his counsel for the preparation or presentation of his case, the same may not be disclosed publicly or to third parties without the prior approval of the Court.

DONE AND ORDERED this 8th day of August, 1972.

/s/ JOSE A. GONZALEZ, JR.
CIRCUIT JUDGE

APPENDIX "D"

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY CIVIL ACTION

Case No. 71-10447 - Richardson

LLOYD F. EARLY,

Plaintiff,

vs.

PALM BEACH NEWSPAPERS, INC., etc., et al.,

Defendants.

ORDER

THIS CAUSE came on to be heard on Defendants' Motion to Strike Plaintiff's claim for punitive damages. After considering argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion to Strike the punitive damage claim is hereby denied.

DATED this 28th day of August, 1972.

/s/ JOSE A. GONZALEZ, JR.
Circuit Judge

Copies furnished counsel.

APPENDIX "E"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTIRCT.

CASE NO. 72-859

PALM BEACH NEWSPAPERS, INC., etc., et al,

Petitioners,

vs.

LLOYD F. EARLY,

Respondent.

PETITION FOR REHEARING PURSUANT TO RULE 3.14

COMES NOW the Petitioners, PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, and respectfully requests this Honorable Court grant a rehearing on Respondent's Motion to Quash Petition for Writ of Certiorari filed September 11, 1972.

Your Petitioners would show as the Court quashed Petitioners' petition for writ of Certiorari on October 10, 1972, your Petitioner is entitled to a rehearing on the following grounds:

1. That the Petition for Writ of Certiorari involved herein is not taken for the purpose of delay nor is it frivolous;

2. That irreparable harm will result if your Petitioners are confined to a direct appeal at the conclusion of this case in a trial court;

3. That your Petitioners will not have an adequate remedy by direct appeal after final judgment in this cause;

4. That substantial questions affecting the right of free speech and free press are involved herein.

WHEREFORE, Petitioners pray that a rehearing be granted and your Petitioner renews its request for oral argument in opposition to the recent motion to quash previously filed herein.

Respectfully submitted,

RYAN, TAYLOR & LAW
P.O. Box 14577
North Palm Beach, Florida
and
HEUER & ALBURY
Suite 200, Pan American Building
West Palm Beach, Florida
Attorneys for Petitioners

By /s/ JOHN F. LAW, JR.
John F. Law, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to FARISH & FARISH, Attorneys for Respondent, 316 First Street, Denco Building, West

Palm Beach, Florida by mail this 17th day of October, 1972.

By /s/ John F. Law, Jr.
Attorney

APPENDIX "F"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1972

PALM BEACH NEWSPAPERS, INC.,
etc., et al.,

Petitioners,

v.

LLOYD F. EARLY,

Respondent.

October 31, 1972.

CASE NO. 72-859.

ORDERED that the October 12, 1972 Petition for Reconsideration filed by Petitioners' Palm Beach Newspapers, Inc., a Florida corporation, Gregory E. Favre, R. H. Kirkpatrick, Tom Sawyer and Jane Arp is granted, and also

ORDERED that the October 17, 1972 Petition for rehearing pursuant to Rule 3.14 filed by the same Petitioners named herein above is granted, and further,

ORDERED that the September 11, 1972 Motion to quash petition for writ of certiorari filed by Respondent Lloyd F. Early shall be reconsidered after oral argument before this court to be scheduled for 9:00 A.M. Monday, November 13, 1972, and further,

ORDERED that the October 16, 1972 Motion for permission to file Amicus Curiae Brief by the various moving Florida newspaper publishers and the Florida Press Association is granted, and the said Amicus Curiae Brief received in this court October 16, 1972 is hereby ordered filed in the above-styled cause.

A TRUE COPY
(COURT SEAL)

/s/ EMMETT J. COMISKEY
CLERK

cc: Ryan Taylor & Law
Heuer & Albury
Farish & Farish

APPENDIX "G"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JANUARY TERM 1973

CASE NO. 72-859.

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE,

Petitioners,

v.

LLOYD F. EARLY,

Respondent.

Opinion filed March 16, 1973.

Petition for Writ of Certiorari to the Circuit Court for Broward County; Jose A. Gonzalez, Jr., Judge.

John F. Law, Jr. of Ryan Taylor & Law, North Palm Beach, and Heuer & Albury, West Palm Beach, for petitioners.

F. Kendall Slinkman, III and Jos. D. Farish, Jr. of Farish & Farish, West Palm Beach, for respondent.

Dan Paul and James Beasley of Paul & Thomson, Miami, as Amicus Curiae, for The Miami Herald, Leesburg Daily Commercial, Palatka Daily News, Fernandina News-Leader, Avon Park Sun, Sebring News,

Gainesville Sun, Ocala Star Banner, Lake City Daily Reporter, and The Ledger of Polk County.

DuBose Ausley of Ausley Ausley McMullen McGehee & Carothers, Tallahassee, as Amicus Curiae, for Tallahassee Democrat.

Thomas T. Cobb of Cobb Cole Sigerson McCoy Bell & Bond, Daytona Beach, as Amicus Curiae, for Daytona Beach Morning Journal and Daytona Beach News-Journal.

Fred T. Gallagher of Vocelle & Gallagher, Vero Beach, as Amicus Curiae, for Vero Beach Press Journal.

Theodore Hainline of Fleming O'Bryan & Fleming, Fort Lauderdale, as Amicus Curiae, for Fort Lauderdale Daily News and Orlando Sentinel.

S. Lindsey Holland, Jr., of Crofton Holland & Starling, Melbourne, as Amicus Curiae, for Today of Brevard County, Titusville Star Advocate and Melbourne Times.

Frank J. Holroyd, Jr., Sarasota, as Amicus Curiae, for Sarasota Herald Tribune and Sarasota Journal.

William J. McLeod of Baynard McLeod Lang & Eckert, St. Petersburg, as Amicus Curiae, for St. Petersburg Times.

W. S. Rodgers, Jr. of McFarlane Ferguson Allison & Kelly, Tampa, as Amicus Curiae, for Tampa Tribune.

Judson A. Samuels, Hollywood, as Amicus Curiae, for Hollywood Sun-Tattler and Stuart News.

Harold B. Wahl of Loftin and Wahl, Jacksonville, as Amicus Curiae, for The Florida Times-Union, Jacksonville Journal, and The St. Augustine Record.

J. Klein Wigginton of McClure Wigginton & McClure, Tallahasseee, as Amicus Curiae, for Florida Press Association.

James M. Talley, Publisher, as Amicus Curiae, for The Sun-Journal of Hernando County.

PER CURIAM.

The petition for writ of certiorari seeking review of an order denying defendants' motion to strike the claim for punitive damages, and an order which denied in part defendants' motion for protective order, is denied without prejudice to petitioners' right to have such matters reviewed upon full appeal if properly assigned and argued.

REED, C.J. and CROSS, J., concur.
OWEN, J., concurs in part and dissents in part.

OWEN, J., concurring in part and dissenting in part.

I would grant certiorari as to that portion of the order denying the defendants' motion for protective order which required the corporate defendant to produce for plaintiff's inspection and copying such defendant's profit and loss statement and its corporate federal income tax returns for the years 1969, 1970 and 1971, respectively, on the basis that such defendant's income was not in issue and was not a proper subject for discovery. Cf., Ernst & Ernst v. Reedus, Fla.App.1972, 260 So.2d 258.

APPENDIX "H"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JANUARY TERM 1973

Case No. 72-859

PALM BEACH NEWSPAPERS, INC., a Florida Corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE,

Petitioners,

v.

LLOYD F. EARLY,

Respondent.

APRIL 10, 1973.

ORDERED that the Petitioners' Petition for En Banc Rehearing, filed March 28, 1973, is hereby denied.

A TRUE COPY
(COURT SEAL)

/s/ EMMETT J. COMISKEY
CLERK

cc: Ryan Taylor & Law
Heuer & Albury
Farish & Farish

APPENDIX "I"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT JANUARY TERM, 1973

Case No. 72-859

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE,

Appellants,

vs.

LLOYD F. EARLY,

Appellee.

ASSIGNMENTS OF ERROR

The Appellants, PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, assign the following errors to be asserted on the appeal heretofore filed in this cause:

1. The Court was in error when it construed a Federal Statute, to wit: United States Code, Volume 26, Section 6103, "Publicity of returns and disclosure of information to persons filing income tax returns", and Section 7213(a), "Unauthorized disclosure of information (a) Income returns."

2. The Court was in error in its construction of a

controlling provision of the Florida Constitution, to wit: Article I, Section IV, guaranteeing freedom of speech and press. Pertinent portions quoted as follows:

> "Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

3. The Court was in error in its construction of Amendments I and XIV of the Constitution of the United States, safeguarding, protecting and guaranteeing freedom of speech and of the press, and the right to privacy.

> "Amendment I (1791) Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Pertinent portions of Amendment XIV are quoted as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The Court was in error when it entered its Order dated March 16, 1973, denying Petitioners' Petition

for Writ of Certiorari for review of an order denying defendants' motion to strike the claim for punitive damages, and an order which denied in part defendants' motion for protective order.

5. The Court was in error when it entered its Order dated March 16, 1973, and its Order of April 10, 1973, in that they are contrary to law, more specifically it is contrary to United States Code, Volume 26, Section 6103 and 7213(a), and contrary to the rights guaranteed by Article I, Section IV of the Constitution of the State of Florida, and Amendments I and XIV of the Constitution of the United States.

RYAN, TAYLOR & LAW
P.O. Box 14577
North Palm Beach, Florida,
and
HEUER & ALBURY
Suite 200, Pan-American Building
West Palm Beach, Florida
Attorneys for Appellants

By:/s/ John F. Law, Jr.
Of Counsel

I HEREBY CERTIFY that a copy of the foregoing has been furnished FARISH & FARISH, Attorneys for Appellee, 316 First Street, Denco Building, West Palm Beach, Florida, 33401, by mail, this 18th day of May, 1973.

/s/ John F. Law, Jr.
Attorney

APPENDIX "J"

Supreme Court of Florida
JULY TERM, A. D. 1973
TUESDAY, JULY 10, 1973

CASE NOS. 43,698 (Certiorari)
43,798 (Appeal)
DISTRICT COURT OF APPEAL,
FOURTH DISTRICT
No. 72-859
(CONSOLIDATED CASES)

PALM BEACH NEWSPAPERS, INC.,
ETC., ET AL.,

Petitioners,
Appellants,

vs.

LLOYD F. EARLY,

Respondent,
Appellee.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

The Motion to Dismiss Appeal filed by appellee Early is granted and it is ordered that the Appeal be and the same is hereby dismissed. ROBERTS, Acting

Chief Justice, ERVIN, ADKINS and BOYD, JJ., concur McCAIN, J., concurs specially

McCAIN, J., concurring specially:

I particularly note that the trial court, while ordering production of certain documents, also prohibited any disclosure of them publicly or to third persons without prior approval of that court. I have no reason to believe that any violation of this order will occur.

A True Copy
(COURT SEAL)
TEST:

Sid J. White
Clerk Supreme Court.
By: s/ Kay D. Yent
Deputy Clerk

YCC: Hon. E. J. Comiskey,
Clerk
Clerk, Circuit Court
Hon. Jose A. Gonzalez, Jr.,
Judge
Ryan, Taylor & Law
Heuer & Albury
Farish & Farish
Paul & Thomson
Ausley, Ausley, McMullen,
McGehee & Carothers
Cobb, Cole, Sigerson,
McCoy, Bell & Bond
Vocelle & Gallagher
Fleming, O'Bryan & Flem-
ing

Crofton, Holland & Starling
Hon. Frank J. Holroyd, Jr.
Baynard, McLeod, Lang & Eckert
Hon. Judson A. Samuels
Lofton and Wahl
McClure, Wigginton & McClure

APPENDIX "K"

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1973
THURSDAY, OCTOBER 11, 1973

CASE NO. 43,698 (Certiorari)
CASE NO. 43,798 (Appeal)

consolidated cases

PALM BEACH NEWSPAPERS, INC., ETC., ET AL.,

Petitioners,
Appellants,

vs.

LLOYD F. EARLY,

Respondent,
Appellee.

Petitioners-Appellants' petition for extension of time for issuance of mandate is granted and proceedings in the Fourth District Court of Appeal and in the Circuit Court in and for Broward County, Florida are stayed to and including November 12, 1973 to enable petitioners-appellants to seek review in the United States Supreme Court and obtain any further stay from that Court.

On consideration of the petition for rehearing filed by attorneys for petitioners-appellants,

IT IS ORDERED by the Court that said petition be

and the same is hereby denied.

ROBERTS, Acting Chief Justice, ERVIN, ADKINS, BOYD and McCAIN, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: /s/ Kay D. Yent,
Deputy Clerk.
Hon. E. J. Comiskey, Clerk
Clerk, Circuit Court
CC: Hon. Jose A. Gonzalez, Jr., Judge
Ryan, Taylor & Law
Heuer & Albury
Farish & Farish
(Hon. Jos. D. Farish, Jr., Hon. F. Kendall Slinkman)
Paul & Thomson
(Hon. Dan Paul, Hon. James W. Beasley)
Ausley, Ausley, McMullen, McGehee & Carothers
(Hon. DuBose Ausley)
Cobb, Cole, Sigerson, McCoy, Bell & Bond (Hon. Thomas T. Cobb)
Vocelle & Gallagher) (Hon. Fred D. Gallagher)
Fleming, O'Bryan & Flem-

ing (Hon. Theodore R. Hainline)
Crofton, Holland & Starling (Hon. S. Lindsey Holland, Jr.)
Hon. Frank J. Holroyd, Jr.
Baynard, McLeod, Lang & Eckert (Hon. William J. McLeod)
Hon. Judson A. Samuels
Loftin and Wahl (Hon. Harold B. Wahl)
McClure Wigginton McClure

APPENDIX "L"

26 U.S.C.A. SEC. 6103

Publicity of returns and disclosure of information as to persons filing income tax returns

(a) Public record and inspection.-

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, subchapter B of chapter 37, and chapter 41, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person, a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Secretary or his delegate. The Secretary or his delegate may prescribe a reasonable fee for furnishing such copy.

(b) Inspection by States.-

(1) State officers.--The proper officers of any State may, upon the request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of any corporation, at such times and in such manner as the Secretary or his delegate may prescribe.

(2) State bodies or commissions.--All income returns filed with respect to the taxes imposed by chapters 1, 2, 3, and 6 (or copies thereof, if so prescribed by regulations made under this subsection), shall be open to inspection by any official, body, or commission, lawfully charged with the administration of any State tax law, if the inspection is for the purpose of such administration or for the purpose of obtaining information to be furnished to local taxing authorities as provided in this paragraph. The inspection shall be permitted only upon written request of the governor of such State, designating the representative of such official, body, or commission to make the inspection on behalf of such official, body, or commission. The inspection shall be made in such manner, and at such times and places, as shall be prescribed by regulations made by the Secretary or his delegate. Any information thus secured by any official, body, or commission of any State may be used only for the administration of the tax laws of such State, except that upon written request of the governor of such State any such information may be furnished to any official, body, or commission of any political subdivision of such State, lawfully charged with the administration of the tax laws of such political subdivision, but may be furnished only for the purpose

of, and may be used only for, the administration of such tax laws.

(c) Inspection by shareholders.--All bona fide shareholders of record owning 1 percent or more of the outstanding stock of any corporation shall, upon making request of the Secretary or his delegate, be allowed to examine the annual income returns of such corporation and of its subsidiaries.

(d) Inspection by Committees of Congress.-

(1) Committees on Ways and Means and Finance.-

(A) The Secretary and any officer or employee of the Treasury Department, upon request from the Committee on Ways and Means of the House of Representatives, the committee on Finance of the Senate, or a select committee of the Senate or House specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution, shall furnish such committee sitting in executive session with any data of any character contained in or shown by any return.

(B) Any such committee shall have the right, acting directly as a committee, or by or through such examiners or agents as it may designate or appoint, to inspect any or all of the returns at such times and in such manner as it may determine.

(C) Any relevant or useful information thus obtained may be submitted by the committee obtaining it to the Senate or the House, or to both the Senate and the House, as the case may be.

(2) Joint Committee on Internal Revenue Taxation.--The Joint Committee on Internal Revenue Taxation shall have the same right to obtain data and to inspect returns as the Committee on Ways and Means or the Committee on Finance, and to submit any relevant or useful information thus obtained to the Senate, the House of Representatives, the Committee on Ways and Means, or the Committee on Finance. The Committee on Ways and Means or the Committee on Finance may submit such information to the House or to the Senate, or to both the House and the Senate, as the case may be.

(e) Declarations of estimated tax.--For purposes of this section, a declaration of estimated tax shall be held and considered a return under this chapter.

(f) Disclosure of information as to persons filing income tax returns.--The Secretary or his delegate shall, upon inquiry as to whether any person has filed an income tax return in a designated internal revenue district for a particular taxable year, furnish to the inquirer, in such manner as the Secretary or his delegate may determine, information showing that such person has, or has not, filed an income tax return in such district for such taxable year. Aug. 16, 1954, c. 736, 68A Stat. 753; Sept. 2, 1964, Pub.L. 88-563, Sec. 3(c), 78 Stat. 844; June 21, 1965 Pub.L. 89-44, Title VI, Sec. 601(a), 79 Stat. 153; Nov. 2, 1966, Pub.L. 89-713, Sec. 4(a), 80 Stat. 1109.

APPENDIX "M"

26 U.S.C.A. SEC. 7213(a)

Unauthorized disclosure of information

(a) Income returns.-

(1) Federal employees and other persons.--It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

(2) State employees.--Any officer, employee, or agent of any State or political subdivision, who divulges (except as authorized in section 6103(b), or when called upon to testify in any judicial or administrative proceeding to which the State or political subdivision, or such State or local official, body, or commission, as such, is a party), or who makes known to any person

in any manner whatever not provided by law, any information acquired by him through an inspection permitted him or another under section 6103(b), or who permits any income return or copy thereof or any book containing any abstract or particulars thereof, or any other information, acquired by him through an inspection permitted him or another under section 6103(b), to be seen or examined by any person except as provided by law, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(3) **Shareholders.**--Any shareholder who pursuant to the provisions of section 6103(c) is allowed to examine the return of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any such return, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 33, I certify that I have this November ---, 1973, deposited in the United States mail box at West Palm Beach, Florida, with first-class postage prepaid, envelopes containing copies of the foregoing petition and appendices addressed to (1) Hon. Joseph Farish, Jr., Attorney for Respondent and counsel of record for him, at his office address, 316 First Street, Denco Building, West Palm Beach, Florida, 33401; (2) Hon. Sid J. White, Clerk, Supreme Court of Florida, Tallahassee, Florida, 32304; and (3) Hon. Emmett J. Comiskey, Clerk, Florida District Court of Appeal, Fourth District, P. O. Drawer A, West Palm Beach, Florida, 33402 and Clyde L. Heath, Clerk, Seventeenth Judicial Circuit Court, Broward County, State of Florida; and that these are all the parties required to be served.

_____

John F. Law, Jr.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-751

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, *Petitioners,*

vs.

LLOYD F. EARLY, *Respondent.*

On Petition for Writ of Certiorari to The Seventeenth Judicial Circuit Court, Broward County, Florida

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Daniel P. S. Paul
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November 23, 1973

MIAMI REVIEW — 371-4853 — 377-3721

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In the Supreme Court of the United States

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vs.

LLOYD F. EARLY, *Respondent.*

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Miami Herald Publishing Company, a division of Knight Newspapers, Inc. (*"The Miami Herald"*) and the Southern Newspaper Publishers Association hereby respectfully move for leave to file the attached brief amicus curiae in this case. The consent of the Petitioners has been obtained. The consent of the Respondent was requested but refused.

The interest in this case of *The Miami Herald* arises from the fact that it is the largest newspaper in Florida and frequently faces litigation raising questions similar to those involved in this case. *The Miami Herald* filed a Brief Amicus Curiae in this case in the Supreme Court of Florida. The interest in this case of the Southern Newspaper Publishers Association arises from the fact that its members publish 407 newspapers throughout Florida and the southern United States, and these newspapers also are frequently involved in such litigation.

The issues involved in this case present substantial questions involving the practical application of the doctrine of *New York Times v. Sullivan*, and *The Miami Herald* and the Southern Newspaper Publishers Association are vitally concerned with these issues.

Respectfully submitted,

/s/ Daniel P. S. Paul

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/s/ James W. Beasley, Jr.

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In the Supreme Court of the United States

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PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE,
Petitioners,

vs.

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Respondent.

On Petition for Writ of Certiorari to The Seventeenth Judicial Circuit Court, Broward County, Florida

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF AMICI CURIAE

As appears from the Petition for Certiorari and as set forth herein, the issues raised by this case present substantial questions affecting the rights of free speech and free press. The decision which is sought to be reviewed

is in direct conflict with numerous decisions of this Court and other Federal and State Courts. Ample and compelling grounds exist for this Court to grant the requested writ of certiorari. Unless this Court accepts jurisdiction in this case and reviews the decision below, the resulting injury to the right of free expression will be immediate and substantial, and any subsequent appellate review of a final judgment in this action would be wholly inadequate to remedy this injury.

For the reasons set forth in the Petition for Certiorari and herein, this Court should grant the Petition for Certiorari and reverse the decision of the Court below.

II. STATEMENT OF THE CASE

The facts in this case are set forth in the Petition for Certiorari and will not be repeated here.

III. ARGUMENT

The Orders of the Circuit Court which Petitioners seek to have reviewed will result in immediate and irreparable injury to the rights of free speech and press under the First Amendment to the United States Constitution. Respondent Early ("Early") is a public official and the publications upon which this case is based clearly relate to his official conduct. Early cannot recover in this action unless he proves that the statements of which he complains were false, and that they were made with actual malice, that is, with knowledge of their falsity or reckless disregard of their truth or falsity. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Petitioners moved for summary judgment in the Circuit Court on the grounds that the articles complained of by Respondent were not published with actual malice,

under the rule of *New York Times v. Sullivan.* The Circuit Court ruled that many of the articles complained of were clearly not libelous. As to the remaining articles, the Court refused to hold that there was insufficient showing of actual malice, holding instead that defendants had not carried the burden "to demonstrate affirmatively the absence of any facts and inferences that would create an issue of conspiracy." Upon rehearing, the Court again denied the motion for summary judgment as to actual malice. The Court's opinion and order ignored the United States Supreme Court decision six weeks earlier in *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971), which held that in cases such as this, the plaintiff has the burden of demonstrating actual malice by clear and convincing evidence. 403 U.S. at 52.

In view of the applicable constitutional precedents, it is extremely unlikely that Respondent will succeed in his libel action. Yet the pre-trial discovery allowed by the Circuit Court, if not prohibited by this Court, will have an immediate, serious, and irreparable effect upon Petitioners, and set a dangerous precedent for other libel actions involving public officials. These constitutional issues present a compelling case for this Court to act to prevent substantial abuses of the rights of freedom of speech and press.

In numerous First Amendment cases, the Courts have recognized that the litigation process itself may have a constitutionally impermissible chilling effect on freedom of expression. If a newspaper, for example, must face the prospect of protracted litigation each time it publishes articles on controversial subjects, the newspaper might tend to begin avoiding controversies. Therefore, the Courts

have struck down deterrents to free publication whose "chilling effect" would tend to induce self-censorship.

One of the principal reasons for the doctrine announced in *New York Times v. Sullivan, supra,* was to provide more "elbow room" for free expression on subjects of public interest and concern. This principal was restated as follows in *Rosenbloom v. Metromedia:*

> "The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance. *Speiser v. Randall,* 357 U.S. at 526." 403 U.S. at 52-53.

To avoid impermissible deterrents to free expression, this Court has held that in a libel action involving public issues, the plaintiff has the burden of proving by clear and convincing evidence that the publication was made with actual malice. In applying this doctrine, the Courts have recognized that procedural matters must necessarily be affected by the doctrine. As the Court of Appeals for the District of Columbia held in *Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (D.C.Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967):

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment

> rights with respect to the conduct of their government. *The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself,* especially to advocates of unpopular cases. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' " (Emphasis added.)

If a public official plaintiff in a libel action against a newspaper is allowed, through the guise of discovery on the issue of punitive damages, to obtain access to the confidential financial affairs of the newspaper before making any showing that he has any chance of meeting the malice test, it would result in precisely the "chilling effect" which the *New York Times v. Sullivan* doctrine was designed to eliminate. One of the most important reasons for granting protective orders against overly broad discovery is the harassment that would result from allowing a plaintiff to use his litigation as an excuse for a fishing expedition through the books and records of a business. Thus the courts in non-First Amendment cases have often protected litigants from such harassing discovery. Even more so, in First Amendment cases such as this, it is crucial for the courts to apply limitations to overly broad discovery, lest its chilling effect eviscerate the constitutional protections of the *New York Times v. Sullivan* doctrine.

The irreparable and substantial injury which will occur to the Petitioner Newspaper (the "Newspaper") if the Circuit Court's order is allowed to stand is obvious. Once disclosure is made of the Newspaper's "books, account books and records, including any net worth and profit and loss statements" and all income tax statements, the damage has been done. If the discovery is allowed, no subsequent appellate decision holding the discovery improper could reverse the fact that the information would already have been disclosed.

The Newspaper has already furnished Early with sworn statements summarizing its net worth, total assets and liabilities for 1969, 1970 and 1971. Thus Early has already received more than he is entitled to on the issue of financial condition of the Newspaper.[1] Such information is the only aspect of the Newspaper's financial status that is conceivably relevant to the punitive damage claim in this case. The Newspaper has admitted a net worth of approximately $14 million, an amount far in excess of the maximum amount claimed as punitive damages by Early. He should not be allowed a fishing expedition to probe beyond this admission, unless he is able affirmatively to show reasonable grounds to believe that the Newspaper's sworn statements of net worth are false.

This Court has held that a public official plaintiff in libel cases such as this must pass an extremely stringent test to impose liability upon a newspaper for publications critical of the official's public actions. However, even if the publisher eventually wins on the merits, his victory

[1]If plaintiff is entitled to any pretrial discovery on the issue of punitive damages, it should be limited to the net worth information already provided by the Newspaper. This information should be deposited under seal with the Court, to be available to plaintiff only if he is successful in establishing his cause of action at trial.

may be a pyrrhic one if the litigation process exposes him not only to substantial expense, but also forces him to reveal his confidential financial affairs. The prospect of such a result would clearly create the "chilling effect" sought to be avoided by *New York Times v. Sullivan* and its progeny. To avoid this result, the discovery of a newspaper's financial affairs should be barred unless and until plaintiff can affirmatively show that he is likely to be able to meet his burden of proving actual malice by clear and convincing evidence. "For the stake here, if harassment succeeds, is free debate." *Washington Post Co. v. Keogh, supra.*

A public official plaintiff in a libel action should not be able to obtain discovery as to the confidential financial affairs of a newspaper, ostensibly on the issue of punitive damages, unless and until the plaintiff can demonstrate affirmatively that he can carry his burden of proving by clear and convincing evidence that the newspaper acted with actual malice. There is ample precedent for such deferrals of discovery in which the burden of discovery on the defendant would be substantially greater than any immediate benefit to plaintiff. Thus, discovery as to the financial affairs of a defendant should be prohibited until the plaintiff establishes his substantive right to the information.

The rationale for the principle that discovery as to a defendant's financial affairs in tort actions, such as libel and malicious prosecution, should be conditioned upon the plaintiff's making an affirmative showing of his right to collect punitive damages from defendant was persuasively articulated in *Gierman v. Toman*, 77 N.J. Super. 18, 185 A.2d 241, 244 (1962):

> "There is no connection between a defendant's wealth and compensatory damages but there is such connection when exemplary damages are demanded. The obviously objectionable features of the present demand are invasion of a traditionally personal and private domain as well as inconvenience of disclosing details. Strictly speaking, orderly procedure requires liability to be proved before damages are available. However, since pretrial discovery precedes proof, should a *prima facie* showing of the right to damages support such a demand? Defendant, even when successful in litigation, absorbs unrecoverable costs and inconvenience. While orderly procedure is preferable, deviation is common practice. The exigencies of a trial require departure at times. However, where a right of a litigant to insist on orderly procedure raises a substantial question of prejudice, albeit of an intangible nature, the strict adherence to procedure seems called for where the character of the harm is irreparable. See Handelman v. Handelman, 17 N.J. 1, 10, 109 A.2d 797 (1954). Just and orderly procedure here requires that *prima facie* proof of the right to recover punitive damages should precede the right to a general disclosure of wealth; and as to specific details such as requested here, the rules furnish sufficient protection against abuse and harassment."

Not only is this doctrine logically sound; it is constitutionally required in tort actions governed by the First Amendment.

IV. CONCLUSION

For the foregoing reasons, and those stated in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment and opinion of the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Florida.

Respectfully submitted,

/s/ Daniel P. S. Paul

Daniel P. S. Paul

/s/ James W. Beasley, Jr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae have been furnished by mail this 21st day of November, 1973 to the following:

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/s/ James W. Beasley, Jr.
James W. Beasley, Jr.

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In the Supreme Court of the United States

OCTOBER TERM 1973

No. 73-751

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE,

Petitioners,

vs.

LLOYD F. EARLY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM 1973

No. _____

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE,

Petitioners,

vs.

LLOYD F. EARLY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PREFACE

The Petitioners are the Defendants in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. The Respondent is the Plaintiff in the Florida Trial Court. No trial has as yet been held on the merits of the Respondent's claim against the Petitioners and no final judgment has as yet been rendered by the Florida Trial Court. The Orders of the Florida Trial Court which the Petitioners seek to have quashed are interlocutory in nature and deal primarily with the Respondent's discovery rights. The review of those Orders by the Florida District Court of Appeal was also interlocutory in nature. Its de-

cision was to allow the Orders to stand without prejudice to the Petitioners to appeal subsequent to final judgment. This was a discretionary decision since the District Court's review was based upon a Petition for Writ of Common Law Certiorari. The following symbols will be used:

(Pet.)—Petitioners' Appendix

(Resp.)—Respondent's Appendix

STATEMENT OF THE CASE

The Statement of the Case in the Petition (pages 5-10) is accepted in part by the Respondent and rejected in part by the Respondent. Certain factual matters should be brought to light.

There are, in fact, two Orders of the Circuit Court of the Seventeenth Judicial Circuit with which the Petitioners express dissatisfaction. The first Order, entered August 8, 1972, ordered the Petitioner, Palm Beach Newspapers, Inc., to produce for inspection its balance sheets *or* statements of net worth for 1969, 1970 and 1971, its profit and loss statements for those years and its corporate tax returns for those years. That Order also required the Petitioner's treasurer to submit to deposition. The Order specifically prohibited the Respondent from disclosing any information obtained to third parties and specifically set forth that these matters were being allowed to be inquired into simply for purposes of pretrial discovery. The Circuit Court did not indicate whether it felt that these matters would be admissible at trial. (Pet. C-1-4)

An Order dated August 28, 1972 was also rendered by the Circuit Court. That Order denied a motion filed by all of the Petitioners to strike the Respondent's claim for punitive damages. (Pet. D-1) The trial of this cause was set for

August 21, 1972 before a jury. While this action has sought both compensatory and punitive damages from the start and has been pending for over three years, it was not until August 7, 1972, some two weeks prior to trial and almost three weeks after the pretrial conference, that the Petitioners moved to strike the Respondent's claim for punitive damages.

Petitioners sought review of both interlocutory orders by means of a Petition for Common Law Certiorari to the District Court of Appeal, Fourth District, of the State of Florida. After the District Court of Appeal rendered its decision unfavorable to the Petitioners, the Petitioners filed a Petition for Certiorari and a direct appeal to the Florida Supreme Court. The Petition for Certiorari was based upon Article V, Section 4(2) alleging "conflict" between the decision of the District Court and decisions of other District Courts and the Florida Supreme Court. The appeal was based upon the allegation that the District Court had construed a controlling provision of the Florida or United States Constitution. The Florida Constitution, Article V, Section 4(2) provides the Florida Supreme Court with appellate jurisdiction to review decisions of District Courts only where the District Court "initially" construed such a provision. In the Petition and the appeal to the Florida Supreme Court, the only matter raised for review was the discovery of the "financial affairs" of the Petitioner, Palm Beach Newspapers, Inc. Although the denial of the Petitioners' motion to strike the claim for punitive damages is mentioned in the Petition and Brief before the Florida Supreme Court, it was not argued as error before that Court and must, therefore, be considered abandoned. At the very least, it is clear the Petitioners did not exhaust their State remedies with reference to this Order. *Banks* v. *California*, 395 U.S. 708 (1969).

The reference by the Petitioners to the act of the Trial Court in granting their motion for summary judgment in part and denying their motion in part is correct. However, this Order and the record before the Trial Court at the time it was rendered is not part of the appellate record. The Order granting partial summary judgment was rendered May 27, 1971, approximately one and one half years prior to the two interlocutory Orders which have given rise to the present appellate litigation.

The Petitioners' statement overlooks the fact that Palm Beach Newspapers, Inc. agreed by stipulation of counsel to answer Interrogatory No. 51 as well as Interrogatory No. 52. Interrogatory No. 52 asked for the same information relating to the Petitioner's subsidiary corporations. (Pet. B-8) It was, however, stipulated between counsel that the answers to these interrogatories need not be furnished until after most of the pretrial discovery was completed and the record reflected whether the Respondent had a meritorious claim. The answers to these interrogatories were to be furnished at pretrial conference held July 19, 1972. (Resp. A7-A9)

At the pretrial conference, the Petitioner's only request with reference to the discovery of its financial circumstances was that the Court limit inquiry to matters dealing with "the facts supporting these figures set forth in the answer to Interrogatory No. 51." The figures set forth in the answer to Interrogatory No. 51 deal with "net worth" as well as "income" of the Petitioner, Palm Beach Newspapers, Inc. In fact, at the pretrial conference, the Circuit Court stated that the deposition was to be so limited and granted the Petitioner's request. (Resp. A9-A10)

The Trial Court's Orders are, of course, interlocutory in character. As such, they are not directly appealable. However, as previously mentioned, the Petitioners did file a Petition for Common Law Certiorari to the District Court

of Appeal, Fourth District of the State of Florida. The District Court heard the case on the merits but denied the relief sought without prejudice to the Petitioners to appeal subsequent to final judgment. The appeal to the Florida Supreme Court was dismissed for lack of jurisdiction and the Florida Supreme Court declined to accept jurisdiction with reference to the Petition for Certiorari.

QUESTIONS PRESENTED

The Respondent takes issue with the questions presented in the Petition (page 4) and respectfully submits that the questions presently before this Court are as follows:

I

DOES THIS COURT HAVE JURISDICTION TO ISSUE A WRIT OF CERTIORARI DIRECTLY TO THE FLORIDA TRIAL COURT WHERE THE DISTRICT COURT OF APPEAL REVIEWED THE ORDER OF THE TRIAL COURT?

II

DOES THIS COURT HAVE JURISDICTION TO REVIEW THE INTERLOCUTORY ORDER OF THE TRIAL COURT?

III

SHOULD CERTIORARI BE GRANTED HEREIN WHERE IT APPEARS THAT THE DECISION OF THE DISTRICT COURT TO ALLOW THE INTERLOCUTORY ORDER TO STAND SUBJECT TO APPEAL FROM AN ADVERSE FINAL JUDGMENT WAS BASED UPON ADEQUATE NON-FEDERAL GROUNDS?

IV

DOES THE CONSTITUTION PROHIBIT THE PRODUCTION OF A DEFENDANT'S FINANCIAL RECORDS SOLELY FOR DISCOVERY PURPOSES WHERE THERE IS A CLAIM PENDING AGAINST THE DEFENDANT FOR WILLFUL AND MALICIOUS CONDUCT?

V

DOES THE CONSTITUTION PROHIBIT A PUBLIC OFFICIAL FROM RECOVERING PUNITIVE DAMAGES IN A LIBEL ACTION UNDER ANY CIRCUMSTANCES?

ARGUMENT

I

Does This Court Have Jurisdiction to Issue a Writ of Certiorari Directly to the Florida Trial Court Where the District Court of Appeal Reviewed the Order of the Trial Court?

The Petitioners claim jurisdiction in this Court pursuant to 28 U.S.C. §1257. (page 2) That statute, however, only confers jurisdiction on this Court to issue writs of certiorari to "the highest court of a state in which a decision could be had". The Petitioners seek a writ of certiorari to the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida—the Trial Court. A Petition for Certiorari was filed by them to the District Court of Appeal, Fourth District of the State of Florida. Although the Respondent's motion to quash the petition as frivolous was originally granted, the District Court, on rehearing, later specifically agreed to hear the Petition. It did, in fact, hear the case. It accepted briefs from the parties and from amicus curiae; it heard oral argument; and it did, in fact, render a decision. Simply because that decision was unfavorable to the Petitioners does not mean that the District Court shirked its jurisdiction. The Florida Supreme Court, of course, specifically held it had no jurisdiction to consider the case, but this was not the situation with reference to the District Court. The District Court specifically held that it did have jurisdiction to consider the case, but, acting within its discretion, denied the Petitioners relief. Under such circumstances "the highest court of a state in which a decision could be had" was the District Court and not the Trial Court. *Williams* v. *Florida*, 399 U.S. 78, 80, footnote 5 (1970); decision to

grant cert. to District Court, 396 U.S. 955 (1969); *Callendar* v. *State of Florida,* 181 So.2d 529 (Fla. 1966); *Dresner* v. *City of Tallahassee,* 375 U.S. 136 (1963); *Gallick* v. *Baltimore & Ohio R.R. Co.,* 372 U.S. 108 (1963). No request has been made for a writ of certiorari to the District Court and this Court is without jurisdiction to render its writ directly to the Trial Court absent a showing that the District Court would fail to obey the mandate of this Court. The Petitioners, having failed to request relief which this Court has jurisdiction to grant, should have their Petition denied.

II

Does This Court Have Jurisdiction to Review the Interlocutory Order of the Trial Court?

The jurisdiction of this Court to grant writs of certiorari in civil cases emanating from state courts is granted by statute. 28 U.S.C. §1257 grants authority to issue writs of certiorari with reference to "final judgments or decrees". The two interlocutory Orders of the Trial Court, the affirmance of those Orders by the District Court of Appeal, the denial of jurisdiction by the Florida Supreme Court, are all decisions which are not final in character. The effect of those decisions is to send the case back for trial on the merits and to allow reasonable pretrial discovery to take place. In *Annotation,* 89 Law Ed. 1186, it is pointed out that even the reversal of a final judgment by "the highest court of a state" is not a final judgment which this Court has power to review if the case is remanded for new trial. Numerous decisions of this Court are cited in that annotation. As Chief Justice Marshall pointed out in *Houston* v. *Moore,* 3 Wheat 433 (1818):

> "The cause may yet be finally determined in favor of the plaintiff in the state court."

Please also see *Moore's Commentary on the U.S. Judicial Code*, 568:

> "A judgment of the highest state court remanding a case for further proceedings, instead of dismissal, is not final even though it disposes of the federal issues."

In *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543 (1947), there was an unqualified reversal of a lower Court proceeding by the California Supreme Court. Under the law of California, such a reversal is effective to remand the cause "for a new trial and places the parties in the same position as if the case had never been tried". Under such circumstances, this Court dismissed the petition for certiorari saying:

> "Under Section 237 of the Judicial Code, 28 U.S.C. Section 344 [now Section 1257] only 'final judgments' of state courts may be appealed to this court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed'. *Department of Banking, State of Nebraska* v. *Pink*, 317 U.S. 264, 63 S.Ct. 233, 235, 87 Law Ed. 254. Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final."

In *Market Street Railway Co.* v. *Railroad Commission*, 324 U.S. 548 (1945), this Court stated:

> "Our jurisdiction to review a state court judgment is confined by long standing statute to one which is final. Judicial Code, Section 237, 28 U.S.C., Section 344, 28 U.S.C.A. 344 [now Section 1257]. Final it must be in two senses: It must be subject to no further review

> or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

Please also see *Southern Pacific Co.* v. *Gileo,* 351 U.S. 493 (1956).

The statute was designed for cases such as the case sub judice. To grant jurisdiction to this Court to review every interlocutory order of every trial court in this nation would flood this Court with petitions from every corner of the country. It may be that after a trial on the merits, the Petitioners will be found not to be liable or a settlement may even be effectuated prior to trial. This Court's case load is burdensome enough without having to review interlocutory orders of trial courts.

III

Should Certiorari Be Granted Herein Where It Appears That the Decision of the District Court to Allow the Interlocutory Order to Stand Subject to Appeal from an Adverse Final Judgment Was Based upon Adequate Non-Federal Grounds?

In an unbroken line of decisions, this Court has held that it rests with each state to prescribe the jurisdiction of its appellate Courts, the mode and time of invoking that jurisdiction and the rules of practice to be applied in its exercise. Moreover, when a State Court, in entering the order attacked in this Court, does so on a non-federal ground, this Court has held it is without jurisdiction to review such order. *Newman* v. *Gates,* 204 U.S. 89 (1907); *John* v. *Paullin,* 231 U.S. 583 (1913); *Atlantic Coastline R.R. Co.* v. *Mims,* 242 U.S. 532 (1916); *Central Union Telephone Co.* v. *City of Edwardsville,* 269 U.S. 190 (1925);

McMaster v. *Gauld*, 276 U.S. 284 (1927); *Wolfe* v. *State of North Carolina*, 364 U.S. 177 (1960). This principle is axiomatic and is concisely summarized in *Stern and Gressman, Supreme Court Practice*, 105:

> "The Supreme Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved and perhaps wrongly decided."

In *Henry* v. *Mississippi*, 379 U.S. 564 (1965), this Court stated:

> "It is, of course, a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, *Murdock* v. *City of Memphis*, 2 Wall 590, 22 Law Ed. 429, but also in cases involving state procedural grounds . . . under the view taken in Murdock of the statutes conferring appellate jurisdiction on this court, we have no power to revise judgments on questions of state law. Thus, the adequate non-federal ground doctrine is necessary to avoid advisory opinions."

The District Court's decision to allow the Trial Court's Orders to stand may have, and probably did, turn upon State procedural rules. Under Florida law, the special circumstances under which an Appellate Court may reverse an interlocutory order by writ of common law certiorari exist only when there has been a clear showing that the order of the Trial Court departed from the essential requirements of the law *and* the petitioner does not have a full, adequate and complete remedy by appeal after final

judgment. *Marlowe* v. *Ferreira,* 211 So.2d 228 (Fla. 2 DCA 1968); *Taylor* v. *Board of Public Instruction,* 131 So.2d 504 (Fla. 1 DCA 1961); *Employers Fire Insurance Co.* v. *Bianchard,* 234 So.2d 381 (Fla. 2 DCA 1970). In fact, even if it were assumed arguendo that the Trial Court Order departed from the essential requirements of the law, an Appellate Court should not grant common law certiorari relief unless it has been convinced that the petitioners have no other adequate remedy, such as by appeal after final judgment. *Wolf* v. *Industrial Supply Corp.,* 62 So.2d 30 (Fla. 1952).

Turning first to the latter Order of the Circuit Court denying the Petitioners' motion to strike the Respondent's claim for punitive damages, it is clear that the Order does not depart from the essential requirements of *established* law. The Petition for Writ of Common Law Certiorari sought to have the District Court expand the constitutional privilege afforded those who would libel public figures in order to insulate them from punitive damages for their malicious acts. Two years ago in the case of *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971) this Court refused to take such a revolutionary step. How, then, can it be said that the Circuit Court departed from the established law? Procedurally the Petitioners had no basis to seek a reversal of the interlocutory Order. Review was granted and the District Court rendered a decision. That decision was that procedurally the Petitioners must wait and appeal these Orders subsequent to an adverse final judgment.

Turning now to a consideration of the Order entered August 8, 1972, the District Court undoubtedly found there was no departure from *established* judicial principles or any irreparable harm. Even assuming that *for purposes of pretrial discovery* the Order was improper, there has been no showing of irreparable harm. The Order clearly pre-

cluded any disclosure of the information obtained to third parties and the issue of its admissability at trial has not as yet been placed before the Trial Court.

The District Court, in the instant case, merely denied the Petition for Common Law Certiorari because the criterion for granting such a petition was not demonstrated. The District Court specifically gave the Petitioners leave to appeal subsequent to final judgment. More than sufficient procedural basis exists for the District Court's decision. The same issues may later present themselves to the District Court subsequent to final judgment. Under such circumstances, this Court should not render "an advisory opinion".

IV

Does the Constitution Prohibit the Production of a Defendant's Financial Records Solely for Discovery Purposes Where There Is a Claim Pending Against the Defendant for Willful and Malicious Conduct?

The August 8 Order of which Palm Beach Newspapers, Inc. complains required the Petitioner to disclose its balance sheets or statements of net worth and its profit and loss statements and corporate tax returns for 1969, 1970 and 1971. That Order, *at the Petitioner's request,* prohibited the disclosure of any of the information obtained to third parties. The well-established law of Florida is that a Trial Court possesses broad discretion in granting or refusing discovery motions and also in protecting the parties against possible abuse of discovery procedures, and only abuse of this discretion would constitute reversible error. *Orlowitz* v. *Orlowitz,* 199 So.2d 97 (Fla. 1967); *Parker* v. *Parker,* 182 So.2d 498 (Fla. 4 DCA 1966). There has been no showing of an abuse of discretion by the Circuit Court.

Incorporated in the Petitioners' argument that the August 8, 1972 Order was erroneous is the statement: "The State Court was in error when it failed to grant Petitioners' Motion for Summary Judgment." (page 13) Such a statement is devoid of the appellate record (which fails to include the summary judgment motion, the order on that motion, and the deposition testimony of malice and conduct bordering on the criminal).

At page 15 of the Petition it is argued that discovery of the Petitioner's finances should be deferred until "prima facie proof of the right to recover punitive damages" is made. Conveniently the Petitioners exclude all deposition testimony from the appellate record. How, then, can they expect this Court to know if such a prima facie showing has already been made? Please note also that such an argument was never raised at the Trial Court level although the Respondent *voluntarily* deferred such discovery. It was not until two weeks before trial that the Respondent insisted on his right to know the truth about the Petitioner's financial circumstances. If, after establishing a prima facie case for punitive damages and waiting two weeks before trial before demanding information relating to a defendant's true financial circumstances, a plaintiff can be barred from gaining knowledge of those financial circumstances, the plaintiff cannot intelligently place evidence before the jury as to the sum of money which would necessarily be awarded to punish the defendant. To establish such a rule of law would be to effectively abolish punitive damage claims in libel actions. Only two years ago a majority of this Court declined to take such a revolutionary step. See *Rosenbloom* v. *Metromedia*, supra.

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) and its long progeny of cases establish the manner in which freedom of speech is to be protected. Assuming a plaintiff can meet the constitutional burden of *New York*

Times Co. v. *Sullivan,* that plaintiff has every right to recover punitive damages as well as compensatory damages. Only by gaining accurate facts about the defendant's financial circumstances may a plaintiff effectively prosecute his claim for punitive damages. There is no established rule of law or constitutional privilege which bars a plaintiff from gaining this information.

Punitive or exemplary damages are awarded as punishment to a defendant and as a warning and example to deter him and others from committing similar offenses in the future. *Miami Beach Lerner's Shops, Inc.* v. *Wallco Manufacturing of Florida, Inc.,* 106 So.2d 233, 236 (Fla. 3 DCA 1958); *Hutchinson* v. *Lott,* 110 So.2d 442, 445 (Fla. 1 DCA 1959); *Fisher* v. *Miami,* 172 So.2d 455 (Fla. 1965). An award of punitive damages while discretionary, should be properly based upon two factors: (1) The ability of the defendant to pay—his financial resources and pecuniary circumstances—*Mayborn* v. *Kuntz,* 56 So.2d 720, 722 (Fla. 1952); *Jones* v. *Greeley,* 6 So. 448 (Fla. 1889); *Hutchinson* v. *Lott,* supra, at pages 445 and 446; and (2) The enormity of the offense which has occasioned the injury.

In determining a defendant's pecuniary circumstances, the jury and the Court have the right to be enlightened as to *both* the defendant's annual revenue and its net worth. As the Florida Supreme Court stated in *Jones* v. *Greeley,* supra:

> "The pecuniary circumstances of the defendant is a proper matter of evidence. Obviously, what would be pecuniary punishment to a man of small means would not be felt as such by one of large means. . . ."

In *Mayborn* v. *Kuntz,* supra, it was held:

> "A verdict of $1,000.00 against a man with a small amount of property, or against a man who earns his

> living 'by the sweat of his brow' may be severe punishment, while the same amount of damages against a man worth a quarter of a million dollars would be no punishment."

At any rate, whether or not a jury can be advised as to a defendant's annual revenue and net income is not the question presently before this Court. The only issue before this Court deals with pretrial discovery of this information. These matters are within the scope of our discovery procedures. Simply because the Petitioner has answered interrogatories setting forth its conclusionary statements as to its net worth and income does not bar the Respondent from testing the creditability of those statements by obtaining the entire factual picture of the Petitioner's finances. The Court is respectfully referred to the case of *Orlowitz* v. *Orlowitz*, supra, at page 98, citing from the *Parker* v. *Parker*, supra, decision:

> "We must say, based upon our understanding of the Rules and the philosophy behind them, that we do not look with favor upon the husband's position in not wishing to reveal any of the details of his financial position and his effort to bridle the dependents' discovery rights by substituting his secondary non-verifiable conclusion in lieu of primary detailed facts. The adversary and the Court are entitled to the whole factual picture to the end that an independent complete understanding and evaluation may be had."

Obviously, net worth and wealth derive from yearly revenue. It is respectfully submitted that the Petitioner's assertions as to its net worth and income are less than truthful. A disclosure of the vast income of this corporate litigant will demonstrate that it must necessarily have accumulated wealth far in excess of what it had admitted. A jury, in assessing punitive damages, has a right to be

aware of all factors going to "the wealth, character and influence" of a defendant. *Lehman* v. *Spencer Ladd's, Inc.*, 167 So.2d 731, 738 (Fla. 1 DCA 1964), affirmed in part, reversed in part on separate grounds, 182 So.2d 482 (Fla. 1965). A disclosure of the Petitioner's true income will lead to exposure of the enormous wealth of the Petitioner which it continues to amass yearly.

Despite the Petitioner's revolutionary arguments, the only portion of the Circuit Court's Order of August 8th which the Petitioner truly asserts as erroneous and devotes any detailed discussion to, deals with the production of the Petitioner's corporate income tax returns. Of course, corporate income tax returns necessarily contain an operating statement for the year. The information set forth in those returns must be factually correct under the penalty of perjury. As discussed above, truthful disclosure of the revenue the Petitioner receives each year would demonstrate the "whole factual picture" of the Petitioner's pecuniary circumstances. Indeed, it may very well work to the Petitioner's benefit, since complete disclosure may demonstrate that most of the Petitioner's wealth is in fixed assets and is in such a non-liquid state that even a small punitive damage award would punish it severely. At any rate, the Respondent has a right to discover this situation prior to trial.

In support of the argument that federal income tax returns are privileged, the Petitioner is able to cite this Court to only one decision, *Federal Savings & Loan Insurance Corporation* v. *Krueger*, 41 Law Week 2040, a Federal District Court decision from Illinois. This is not the law of a majority of the Federal Courts. Florida law has also held these returns not to be privileged. See *Fryd Construction Corporation* v. *Freeman*, 191 So.2d 487 (Fla. 1966), page 489:

"In this State copies of income tax returns have not been held to be privileged; therefore, they may be used in State court proceedings where they are relevant."

The Third District Court of Appeal did not say that these were not privileged for the plaintiff but were privileged for the defendant. The District Court stated that the returns must be produced where they would lead to relevant information. That is the situation in the case at bar.

Numerous federal decisions have required defendants to produce their income tax returns. The contention that the defendant did not put his returns in issue and therefore may not be required to produce same has been rejected by a majority of the Federal Courts. See *June* v. *George C. Patterson Co.*, 155 F.2d 963 (7th Cir. 1946); *Paramount Film Distributing Corporation* v. *Ram*, 91 F. Supp. 778, 781 (D.C. S.C. 1950); *Connecticut Mutual Life Insurance Co.* v. *Shields*, 18 FRD 448 (D.C. N.Y. 1956); and *Mullen* v. *Mullen*, 14 FRD 142 (D.C. Alaska 1953). At page 143 of the *Mullen* decision, it was stated:

"The second item is the personal income tax return of the defendant Mullen's wife. Some of the authorities cited by the defendant Mullen clearly support the proposition that income tax returns are not available under Rule 34, *but the numerical weight of authority appears to be to the contrary.* Since the question has not been before the Supreme Court or the Court of Appeals for the Circuit, the question is an open one in this court. On the authority of 4 Moore 1168, I am inclined to the latter view. C. F. Nola Electric Company, Inc. v. Reilly, 11 FRD 103, cert. denied, Reilly v. Goddard, 340 U.S. 951, 71 S.Ct. 570, 95 L.Ed. 685." [Emphasis supplied.]

The Petitioner, Palm Beach Newspapers, Inc., has demonstrated no constitutional basis for this Court to intercede in this controversy or to reverse the Trial Court's interlocutory Order allowing reasonable discovery.

V

Does the Constitution Prohibit a Public Official from Recovering Punitive Damages in a Libel Action under Any Circumstances?

There is no constitutional privilege to maliciously and unjustifiably defame a public official. Simply because the victim of one's defamatory comments happens to be a public official does not insulate a defendant from punitive damages. A review of *New York Times Co.* v. *Sullivan,* supra, and its progeny fails to disclose a single decision which would grant a malicious defendant immunity from punitive damages because his victim was a public official. In fact, the Respondent has failed to locate a single majority opinion, state or federal, in the history of American jurisprudence which holds that a public official may not obtain punitive damages against a defendant in a libel action. In brief, there is simply no authority for the Petitioners' assertion. Clearly, the Trial Court followed applicable existing principles of law in denying the motion to strike the claim for punitive damages.

Actually, little needs to be said regarding this point. Although Petitioners raised this point as Question No. 2 (page 4), they failed to argue it in the Petition. In fact, this point was also not raised before the Florida Supreme Court. The decision of the District Court was rendered March 16, 1973 and Petition for En Banc Rehearing denied April 10, 1973. The point was not again raised until its brief mention in the Petition before this Court. Under such circumstances, the question should not be considered.

CONCLUSION

The Petition does not present any questions warranting review by the Court and should be denied.

Respectfully submitted,

Jos. D. Farish, Jr.
Of Counsel

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Attorneys for Respondent

APPENDIX A

Transcript of Proceedings at the Pretrial Conference Held July 19, 1972 at the Broward County Courthouse, Fort Lauderdale, Florida, before Honorable George Richardson, Jr., Presiding Judge.

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA.

CIVIL ACTION

No. 71-10447—Richardson

LLOYD F. EARLY,
Plaintiff,

vs.

PALM BEACH NEWSPAPERS, INC., ET AL.,
Defendants.

Fort Lauderdale, Florida
July 19, 1972
10:00 o'clock A.M.

APPEARANCES:

FARISH & FARISH, ESQS.,
by JOSEPH D. FARISH, ESQ., of counsel,
Appearing on behalf of the Plaintiff.

HEUER & ALBURY, ESQS.,
by CECIL H. ALBURY, ESQ., of counsel,
appearing on behalf of Defendant.

RYAN, TAYLOR, BOOKER & LAW, ESQS.,
by JOHN F. LAW, JR., ESQ., of counsel,
appearing on behalf of Defendant.

The above-styled case came on for pretrial conference before the Honorable GEORGE RICHARDSON, JR., Presiding Judge, at Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 19th day of July, 1972, commencing at 10:00 o'clock A.M.

[2] Thereupon:

The following proceedings were had:

MR. FARISH: Judge, I did not attempt to haul my exhibits in. They are available in my office. I haven't had a chance to look at opposing counsel's. I'm afraid they would have been destroyed if I had brought them today, on a day such as this. They are available right there at the office.

THE COURT: On your catalogue you got exhibits, and then numerous Post, Post/Times and Times articles maligning Plaintiff, and then you have a group of names. What names are those, people that have written articles or what?

MR. FARISH: Names of witnesses on the front, sir—I'm sorry. Those names afterward?

THE COURT: Yes.

MR. FARISH: I have two pages.

MR. ALBURY: You have two page fours.

MR. FARISH: I have two page fours. Should have been—

THE COURT: These are all witnesses then?

MR. FARISH: Yes.

THE COURT: How could we handle the exhibits then? You have a right to see them.

MR. ALBURY: We have made ours available as of the 13th and they are setting over here. I don't know what he's talking about when he says numerous articles. The lawsuit has been limited to certain specific paragraphs.

[3] MR. FARISH: Not limiting our evidence though.

MR. ALBURY: If he wants to bring in a lot of evidence in the form of newspaper articles, it's totally immaterial. He has to prove the articles that he sued on, Number 1, are false; and Number 2, were directly falsified for print with a high awareness of probable falseness, and that's all that's involved. Ill will, the Supreme Court has said, has nothing to do with it. You have to intend to harm through falseness.

I don't even, you know—The articles aren't even identified.

I don't—I'll be happy to go to Joe's office and look at what he has.

MR. FARISH: Well, this is in proper order, Your Honor. Articles being sued upon are one thing. Evidence is another. We anticipate using these as evidence. We think it's impossible to list them as such.

MR. LAW: Your Honor, we have here everything we intend to use as exhibits. That's what the pretrial order calls for.

THE COURT: That's right.

MR. FARISH: Judge, if I would have brought them today, it was raining, I just didn't feel it was proper to do that.

THE COURT: You made up your mind just before you left?

MR. FARISH: Yes, sir. We couldn't haul them out in the rain like this. They would have been ruined.

MR. ALBURY: Well, ours are a little damp, but they [4] aren't ruined.

MR. FARISH: Well, we have many more than you have.

THE COURT: Well, all right. Supposing he goes over to your office and there's some objection or something, then what happens?

MR. FARISH: Well, sir, you couldn't rule on those now, I don't think, sir. I mean we offer them now as prospective use of same. I might not use them all.

THE COURT: But he has to be aware of what you're going to use.

MR. FARISH: Correct. Right, sir. I'll show him those. They are all there.

THE COURT: But the Court isn't going to have any list so I know whether you showed it to him or not.

MR. FARISH: Well, we can compile a list there at the time.

THE COURT: In other words, the idea is for me to know that this was—that he did see this, and there should be some list showing that he did see it, and that you intend to use it and they are aware of it, otherwise he just looks at a bunch of articles and I don't know.

MR. FARISH: All right, sir. He can look at the articles and make a list of each one of these.

MR. ALBURY: Well, Judge, I'm not going to do his work for him.

[5] THE COURT: It's not his duty to prepare the list.

MR. FARISH: All right, sir. I'll prepare a list and he can read the list, if he can read. I'll just write it down for him, see.

MR. ALBURY: I do think I'd be able to read it if it is written legibly.

MR. FARISH: Good.

THE COURT: Well, we are not going to get very far today, I can see that.

MR. FARISH: I'll tell you what we can do. He can initial the back of each article that we are going to show him. How would that be?

I'm not saying, and I don't think this is the time to rule on it, that Your Honor would want to rule on the ad-

missibility of them at the present time. If that were the case, we wouldn't bother with the trial because it has to have testimony to make them admissible, but I'll show them to him. He can initial them and date them, each one of these, sir, and if he wants to object to them, he can put objection as to what it is right on the back of each one. I make that as a suggestion.

THE COURT: Suits me, if it suits the other side.

MR. ALBURY: I'd be happy to look at the articles.

MR. LAW: Judge, the exhibits are supposed to be furnished according to the pretrial order before Your Honor where we can state whether we have any objection or whether we [6] are going to let—whether we consider them irrelevant or immaterial, and the Court is supposed to have a list prepared to see them. To go to his office and go through a bunch of articles that have been initialed, it's entirely improper.

MR. ALBURY: Well, I'm concerned, too. What about our exhibits? We have that stack over there and we made them available to Mr. Farish on July 13th. He never came to look at them. Are we going to go through those two boxes item by item? Most of those are documents which they produced under a motion to produce, and I'm sure that they know what they are.

THE COURT: What I'm looking for is my pretrial order.

MR. FARISH: Rather than consume the time of the Court, Your Honor, I would suggest that I do the same thing with their particular articles and/or exhibits. I'll initial them, and if I agree on admissibility, okay; if not, I'll say objection.

MR. ALBURY: Your order is dated May 31st, Judge.

THE COURT: May 31st?

MR. LAW: That was the second order setting this one up. There was a previous order.

MR. ALBURY: There was a prior order. The first order was March 30th, then it was changed.

THE COURT: Well, it's a printed form.

MR. ALBURY: Yes, sir. There is a printed form attached to it.

THE COURT: Well, do you want to do that or not? I'll [7] go along with what you—

MR. ALBURY: They are there, Judge. Whatever the Court wants to do. We wrote Mr. Farish on July 13th and said, "Here they are. We can't bring them over there, but you can come to the office any time you want to and go through them."

I think it's a waste of the Court's time to sit and go through those things item by item. There are two years of tape print-outs of board minutes.

MR. FARISH: Is that what most of your stuff is?

MR. ALBURY: That entire box is that. The rest of them are things—

MR. FARISH: Your Honor, I can take care of that. As to the authenticity of it, I would have no objection, but provided it's relevant and material.

THE COURT: Well, let's back up. Ay questions that you would like on the witnesses?

MR. ALBURY: As to the witnesses, no, sir.

We have pending before the Court a motion for permission to take another deposition. This is the original. We didn't file it because we just had it done Monday. I'll serve a copy on him. We had it originally set back in June, served Claude Kirk with a return to show it was served on him personally. Thereafter, Mr. Farish called and asked that it be changed to June 28th, which we did. We sent letters confirming, which are attached to the motion. Thereafter, he called and asked that it [8] be changed again and defense declined to change it, and he filed a motion for a protective order, wherein he alleged,

among other things, that the witness, Claude Kirk, was unavailable at the time to testify. Mr. Farish, of course, is Mr. Kirk's personal attorney. We have attached copies of their pleadings in other cases now pending in this county's circuit court, and Judge Warren heard the motion, I believe at the time Your Honor was in trial, he ordered the deposition of Mr. Kirk be taken last Thursday and we showed up at 10:00 o'clock to take it, Mr. Kirk's deposition. We were presented with an affidavit from Mr. Farish stating that he had served one of Mr. Kirk's aids, and Mr. Kirk did not appear. We were there at that time on Thursday. The pretrial conference is today and the pretrial order states all depositions be concluded, and through the changing of dates, we were never made aware of the fact that Mr. Kirk was not going to appear. We thought he had been served properly because the sheriff's return showed he was served personally, and we were— We suggest to the Court that we be permitted to take his deposition or that Plaintiff not be permitted to use him at the time of trial.

MR. LAW: He's listed as a witness on the pretrial.

MR. FARISH: Your Honor, a little recap on this situation. I was under the impression that Governor Kirk had been served properly and we were working under that erroneous impression, when it was discovered, and I contacted the Governor [9] and asked him if he would appear, he said, "No. I haven't been served." I checked with the sheriff's department and that's true. He was not served. That's the problem that they are facing. They wait till the last minute, the 11th hour, to take a deposition. They knew about Governor Kirk for years.

MR. ALBURY: Judge, he keeps saying that, but we had it set way back in June, but because of him it was changed and he got a court order changing it.

THE COURT: I'll grant you the right to take the deposition.

MR. FARISH: I can't produce him. I might be his attorney, but as you well know, Governor Kirk has a mind of his own.

THE COURT: If he gets served, he'll come.

MR. FARISH: I can't produce him.

MR. ALBURY: The sheriff's return shows it was personally served upon him. He was served by a guy by the name of Hoffman. He says he told the Governor about it by telephone.

MR. FARISH: Now, have you produced your net worth and your income?

Your Honor, we'd like to reserve the privilege of interrogating someone about this. We had an agreement between counsel to do this and we had a reneging of counsel in doing it before. That's why we are just now getting it. We had a motion—

MR. LAW: The order provides that it be presented [10] at the pretrial conference.

MR. FARISH: 30 days before, and you didn't do it.

I'd like to have the privilege, sir, of examining somebody. Somebody's sworn statement doesn't mean anything to me unless I can interrogate the person.

MR. ALBURY: Judge, to clear the air on this, the original agreement on 30 days was when there was no pretrial conference set, and Joe and I agreed to 30 days before trial. Then Your Honor set a pretrial conference and the original order provides it be made available at pretrial conference.

MR. FARISH: And, Your Honor, there is also an agreement on the record and I can show it to him where we had asked him to produce it and he said he would as to the—what's this other one?

MR. ALBURY: Cox Enterprises

MR. FARISH: Cox Enterprises, and he reneged on that one, too.

MR. ALBURY: The Court entered an order limiting that they are not allowed—

MR. FARISH: After you reneged, when you had agreed to do it. You don't deny that?

MR. ALBURY: I don't deny that I agreed to do it. I don't represent them and they are not going to get them.

MR. FARISH: I would like Your Honor to at least give me the privilege of interrogating under oath—who's this man?

[11] MR. ALBURY: Roswell, Ronald Roswell.

MR. FARISH: Is he local?

MR. ALBURY: Yes. He's the treasurer.

MR. FARISH: Okay.

THE COURT: In other words, you want to take his deposition?

MR. FARISH: Yes, sir, to find out what these numbers mean. This is the first time I have ever gotten anything.

THE COURT: What about a deal? What about if you produce your man and they produce their man?

MR. FARISH: Well, I can't control Mr. Kirk, sir. If I could control him—As you well know, he has a mind of his own. I don't think his wife could even tell him what to do.

I'll just put a subpoena on this man here, too. We just will play it by the rules.

MR. LAW: That won't be necessary.

MR. ALBURY: What's he going to be allowed to inquire into?

MR. LAW: We are not going to get that squared away.

MR. FARISH: Net worth and operating statement.

MR. ALBURY: The facts—Wait a minute, operating statement including what now? The facts supporting these figures that we have?

MR. FARISH: Yes. When you give a statement like income for the corporation for the year—well, they didn't get [12] here till '69, I guess '69, don't even have '70.

MR. LAW: Those are the answers to your questions, Joe.

MR. FARISH: That's right.

MR. LAW: They are answers to interrogatories.

MR. FARISH: You don't give me the year '70. Anybody that believes that the newspaper made $144,000.00 would be out of their mind.

So, sir, I need to ask him to produce his books and records. At the same time we'll give him a subpoena and just ask him about his operating statement since this group invaded our area and also their net worth and how they arrived at it. Just intangible can mean many things. It's very vague. Doesn't even meet the Court's order or the stipulation of counsel, which is worthless.

THE COURT: On the new witnesses, there ought to be a cut-off date.

MR. FARISH: Yes, sir.

THE COURT: And you also ought to notify them in writing and a copy to the Court.

MR. FARISH: All right, sir.

MR. ALBURY: What are we doing now, going to be allowed to add new witnesses?

THE COURT: If someone—Now, I would require that it would be that you would have just discovered a witness, that [13] you're not just holding back.

MR. FARRISH: Yes, sir. I understand. I have tried to, I listed everyone I can.

THE COURT: So the cut-off date would be ten days before trial.

MR. FARISH: All right, sir. That would be 8/21.

THE COURT: Realizing, of course, even my order says no more depositions, if someone comes up and they ask to take their deposition, I'd grant it.

MR. ALBURY: On that point we have one we scheduled, but the man has been on a leave of absence. That's Dewey Dodd in Atlanta. He got back in yesterday.

MR. FARISH: You haven't noticed me, have you?

MR. ALBURY: No. We can take it next week. We didn't notice it because we couldn't take it before the pretrial. He got back Monday. We can take it next week, if the Court will permit.

THE COURT: I want all the loose ends tied up.

MR. ALBURY: We have already appointed the commissioner to take it, but we couldn't get him.

THE COURT: I don't know whether I can go along on this last paragraph, Plaintiff reserves the right to introduce additional exhibits in the form of newspaper articles.

MR. FARISH: Well, they keep writing them, sir. They write them every day. They had one here day before yesterday, [14] sir.

THE COURT: Concerning this?

MR. FARISH: Well, it's bombarding Mr. Early here; the headline, "Early cuts budget." Well, he hasn't got anything to do with the cutting of the budget. He has to present what he feels are the best items to be presented to the board and they just keep on maligning him. That's the point. I think it's going toward the motive, sir. Even though the articles themselves are not a part of the litigation, it goes to their motivation sir, that they don't ever let up. It's unbelievable, when Your Honor gets into the situation, what these, this media is attempting to do, to brainwash the public up in our area and doing a job in some respects. It's evident by the fact that Judge White moved the case down here because he felt he couldn't get a fair jury and it goes to all that, sir. It's a question of each one to be valued for the purpose it was published. If it's a news worthy item, they are not picking on the man. That's a

different story, but when they are constantly pounding him on a day to day basis, they might do it two days before trial, sir.

MR. ALBURY: Judge, we ought to agree to let those articles go in so you can see what they do say. What he just referred to he misquoted. It said Early had been ordered to cut the budget because he brought in a budget of $12,000,000.00 over their income, when he knew what their income would be. They might want to bring in Thelma Weimer, who is one of his supporters [15] on TV castigating his administration for even considering such a budget.

This thing about Judge White's order, we had the order transcribed and presented the order to Your Honor. He says because of the busing situation in Palm Beach County and the mothers out marching up and down with signs saying "Early come walk the killer roads with us", that nobody, including a janitor in the school system in Palm Beach County, could get a fair trial.

Now, Your Honor has ordered that this not be brought up. That is why we filed the motion. These articles have nothing to do—we can give you dozens of United States Supreme Court decisions saying he has to prove that these words, the paragraphs that the Court has limited him to, are false to begin with before he gets anywhere else, and then he goes into the actual malice. Garrison vs. Louisiana, ill will.

THE COURT: That brings this to my mind. I would appreciate both of you submitting memos well ahead of the trial on the law that you feel will be involved in the trial.

MR. LAW: We have them, Judge.

THE COURT: I do need a liberal education on this.

MR. ALBURY: The first one is on general areas and there are several on particular items of evidence and so forth.

THE COURT: Fine.

MR. LAW: Do you have a copy of your memorandum, Joe?

[16] MR. FARISH: I'm going to hand it to you if you wait a minute. Patience, young man, patience.

MR. LAW: Not one of my virtues.

THE COURT: You all feel these are the points that will come up in trial?

MR. ALBURY: We haven't covered this thing of bringing in additional articles. We would like to submit a short memo on that.

THE COURT: I'd like it, both sides.

MR. ALBURY: All right, sir.

THE COURT: Any of these so-called additional exhibits, they ought to be presented within that same time limit as the witnesses.

MR. FARISH: All right, sir.

THE COURT: Cut off ten days, and I intend to hold that anything that has not been exhibited to either side, I mean if one hasn't, it will not be admitted. So, I don't know how you're going to show the Court that it's been looked at.

MR. FARISH: We'll initial it, like we said, Judge, on the back.

THE COURT: If anybody is unhappy with the fact that the exhibits aren't here today, I'm willing to set another time when they all can be in at the same time. I know it means another trip down here.

Let's put it this way. You look at each other's exhibits. [17] If there's any difference of opinion, I'll be willing to set another session to just involve the exhibits because I don't want a lot of thrashing around on this trial, arguing as to whether something has been presented or not.

MR. ALBURY: Well, I believe we have listed in our catalogue, Judge, every exhibit we intend to use and they are available to Mr. Farish at his convenience.

THE COURT: All right.

MR. FARISH: You have two editorials of WJNO. Were they transcribed?

MR. ALBURY: Yes.

THE COURT: All right. I think I'm going to do this. Within five days from today, I would like to have the pretrial catalogue of the Plaintiff amended to add a list of his exhibits.

MR. FARISH: All right, sir. File it with the Court?

THE COURT: And a copy to counsel.

MR. FARISH: All right, sir.

THE COURT: And again I say if for any reason that another supplemental pretrial is necessary, I'm willing to have it. I don't know when I'll put it in, but I'm willing to have it.

What else can we do?

MR. FARISH: As I understand it, Your Honor made a verbal ruling that Governor Kirk's deposition will be taken in accordance with the rules, and Your Honor's cut-off time does [18] not apply to that; neither does it apply to the witness—

MR. ALBURY: Roswell.

MR. FARISH: Roswell.

THE COURT: And this other one in Atlanta.

MR. ALBURY: Dodd.

MR. FARISH: I don't think we need an order on that. Just follow the procedures on that.

THE COURT: I believe I can just, when we are through today, just adopt the record.

MR. ALBURY: Fine. Will Your Honor—Well, will Your Honor enter an order as to the number of peremptory challenges and so forth?

THE COURT: Well, let's see. You've got—three parties are there?

MR. ALBURY: One Plaintiff, one corporate Defendant and four individual Defendants.

THE COURT: Do you all want to agree?

MR. ALBURY: 15?

MR. FARISH: That's agreeable.

THE COURT: All right, the Court will approve 15.

MR. ALBURY: Now, will the Defendants, each defense counsel have a voir dire? I represent two of the individuals here. He represents two of the individuals and the corporate entity. We don't propose to have a lengthy voir dire each, but if there is something he hasn't covered, I would like to cover it.

[19] THE COURT: Well, the Court feels if the man is represented, his attorney has a right to voir dire.

MR. ALBURY: All right, sir.

MR. FARISH: Who represents the corporation?

MR. LAW: I do.

MR. FARISH: You represent—I never did know who you all represented.

MR. ALBURY: He filed a notice of appearance as to the people he represented.

MR. FARISH: I don't read too good. You represent the corporation, that's all, right?

MR. LAW: No. ARPE and Kirkpatrick.

MR. ALBURY: And I have Favre and Sawyer.

THE COURT: I would appreciate receiving a letter pointing out to me the date of the order concerning the articles and limiting the use of the paragraphs, or whatever the order is.

MR. ALBURY: All right, sir.

THE COURT: And from both sides maybe a little letter or memo pointing out the various orders that have taken place or have been issued by another judge that

will be pertinent in the trial so that we won't have to thumb through the files. I'll just be aware of them.

MR. ALBURY: This is the order striking the articles and limiting it to paragraphs. This is the order granting summary judgment. If you would just like to keep those for your [20] reference.

MR. FARISH: Judge, that order is a little bit difficult to interpret, sort of a double negative order. In other words, it grants the striking of certain paragraphs, and obviously, the ones—or denies, rather, I forget which way it is, makes it a little difficult.

MR. ALBURY: I gave you the wrong order. I'm sorry. The order granting partial summary judgment is this one.

MR. FARISH: The wrong one. What's the date?

MR. ALBURY: Doesn't have any date on it.

THE COURT: Well, you can just send them to me. That goes for both sides.

MR. LAW: Judge, the suit started out with 108 articles, and then the articles were stricken, and instead excerpts from the articles by a bill of particulars. The Plaintiff was required to take the excerpts from the articles that were considered libelous and then many of these excerpts were, by summary judgment, declared as a matter of law not to be libelous, so we are left with about, excerpts from about 50 or 60 articles I think.

MR. FARISH: 55.

MR. LAW: 55 articles. So, that's—

MR. FARISH: It's real difficult to follow the order after you see it, Judge, because you have to have the articles in front of you and go back and forth.

MR. ALBURY: No. He sets out in his order the portions [21] that are left in. Very specific about it. He says the following portions, or the following paragraphs, the summary judgment is denied. As to all others, it's granted.

THE COURT: Well, I want to be thoroughly familiar with this order, so if you could just send me copies of the ones that you feel are pertinent and the ones you feel are pertinent, and if you want to underline your thoughts, each side, that suits me fine, too.

MR. ALBURY: That's the end of my checklist.

THE COURT: How about you?

MR. FARISH: I don't have anything else, sir.

THE COURT: All right, then I will adopt this as the pretrial order, and if you would type what you have today and submit it to the Court, please.

[22] CERTIFICATE

I HEREBY CERTIFY that the foregoing, pages 1 to and including 21, is a true and correct transcription of my stenographic notes of testimony taken and proceedings had before the Honorable GEORGE RICHARDSON, JR., Presiding Judge, at Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 19th day of July, 1972, commencing at 10:00 o'clock A.M.

IN WITNESS WHEREOF I have hereunto affixed my hand this 31st day of July, 1972.

/s/ Leo A. Koenig
Reporter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been furnished John F. Law, Jr., Esq., Ryan, Taylor & Law, P.O. Box 14577, North Palm Beach, Florida 33408, Attorneys for Petitioners, by mail, this 30th day of November, A.D. 1973.

Jos. D. Farish, Jr.
Attorney

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-751

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, *Petitioners*,

v.

LLOYD F. EARLY, *Respondent*.

On Petition for Writ of Certiorari to the Seventeenth Judicial Circuit Court, Broward County, Florida

MOTION OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the American Newspaper Publishers Association (hereafter "ANPA"), by its counsel, and moves this Honorable Court for leave to file brief *amicus curiae* in support of the petitioners herein on the following grounds:

1. The ANPA is a non-profit organization organized and existing under the laws of the Commonwealth of Virginia. Its member newspapers comprise more than

ninety percent of the daily and Sunday circulation of newspapers within the United States.

2. The filing of such a brief has been consented to by the petitioners and, although the Respondent has been requested to consent to the filing of such a brief, he has refused.

3. The ANPA desires an opportunity to state to this Court the position of the majority of its members on the substantial First Amendment question presented to this Court by the petitioners. Although the orders of the Court below in this case would appear at first glance to relate only to interlocutory matters of discovery, concealed in those orders is a threat to petitioners' free and unfettered exercise of their fundamental right to publish comment on matters of public concern in a spirited and uninhibited manner. If the discovery orders in the Court below are allowed to remain standing, they will set a precedent which will have serious impact upon all members of the ANPA in the free and unfettered exercise of their First Amendment rights.

WHEREFORE, the ANPA respectfully urges that its motion for leave to file brief *amicus curiae* in support of the petition be granted.

Respectfully submitted,

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Attorneys for The American Newspaper Publishers Association

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BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The American Newspaper Publishers Association (hereafter "ANPA") submits this brief as *amicus curiae* in support of petitioners' petition for a writ of certiorari to the Seventeenth Judicial Circuit Court,

Broward County, Florida. Although your *amicus* obtained consent to the filing of this brief from petitioners, it was denied such consent by respondent. Accordingly, a motion for leave to file this brief is submitted to this Court herewith.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a nonprofit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of approximately 1100 daily newspapers, representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. In addition to the three newspapers published by the Palm Beach Newspapers, Inc., there are twenty-three other ANPA newspaper members located throughout the State of Florida.

If a libel plaintiff, by setting forth allegedly libelous statements taken from the newspaper defendant's pages and then merely alleging actual malice, may compel a newspaper to divulge its most private financial data, including its income tax returns, with the possibility that such information may become known to the public in general and, more specifically, to that newspaper's competitors, your *amicus* submits that its newspaper members' editorial enthusiasm must surely be intimidated by such unconstitutional exposure. The effect of the orders of the Court below, although subtle, are clearly unconstitutional and violate the petitioners' and other publishers' First Amendment guarantee of freedom of the press.

ARGUMENT

Your *amicus* will not here set forth a recital of the procedural background giving rise to the instant petition. Those facts are amply set forth by the parties in their briefs. Suffice it to say, however, that the clear First Amendment question presented by the petition goes to the heart of the guarantee of a free press.

The merits of the case brought below by respondent are governed by *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), in that respondent, plaintiff below, must show that the alleged libelous publications were false and that they were made with actual malice as defined in that case. However, the offending orders promulgated by the Court below require the petitioners to come forward with the most private of financial detail having to do with the operation of their press upon unsupported allegations of actual malice. It appears clear to your *amicus* tha the requirement that this highly private and perhaps competitive information be revealed on mere allegations constitutes that type of unconstitutional restraint upon the press that this Court has struck down many times before in its vigilant protection of the press. Extensive argument does not appear necessary to show that the mere specter of a libel action in which this type of information might have to be revealed has a most certainly intimidating effect on

> "* * * the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times, supra,* at page 266 quoting *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

In *New York Times,* this Court made it abundantly clear that the very essence of a free press is its ability to comment vigorously and antagonistically, particularly in the field of political activity, and this Court in that case gave protection to that type of comment even though it may have been false if uttered in good faith. It obviously appeared to this Court that it would be better for perhaps provocatively false comment to be published than to restrain vigorous public debate in the press.

What we suggest to the Court in this case is a logical and necessary extension of the doctrine of *New York Times.* That case teaches that, in order to recover in a libel action against a newspaper, actual malice must be shown and that it must be shown with the convincing clarity which the constitutional standard demands. We suggest that this Court extend the doctrine of *New York Times* and, indeed, *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971), by requiring a libel plaintiff bringing an action against a newspaper to show a *prima facie* case of actual malice before such plaintiff be permitted to discover any financial information concerning the operation of a newspaper. Although your *amicus* does not presume to advise this Court how that procedure should be utilized in assuring this First Amendment safeguard, certainly a reasonable possibility would be to require the plaintiff to make a pre-discovery showing to the court by oral testimony and/or documentary evidence or by a written proffer of testimony certified by counsel for the Court's determination as to whether or not plaintiff will, at trial, reasonably be anticipated to make a *prima facie* case of actual malice with evidence of the required convincing clarity.

This additional procedural requirement on a libel plaintiff, although indeed burdensome, must certainly be justified by the safeguard it would afford to the press.

Finally, although the great concern of the Amicus relates to the First Amendment issue which is the heart of the Petition, it appears that the extent of the discovery permitted by the court below is clearly excessive and totally unnecessary. The District Court of Appeal, First District, State of Florida and the Supreme Court of Florida have correctly laid down the rule that evidence of "financial worth" of a defendant may be discovered in the case where punitive damages are allowable. *Spencer Ladd's, Inc.* v. *Lehman, et al.,* 167 So. 2d 731 (1964), 182 So. 2d 402 (1965). That same Florida District Court of Appeal, however, recently held in the case of *Tallahassee Democrat, Inc.* v. *Tom Pogue,* 280 So. 2d 512 (1973), that a profit and loss statement and income tax returns do not necessarily portray a true picture of "financial worth" and quashed an order of the Florida circuit court which had ordered the newspaper to produce tax returns and a profit and loss statement. In quashing the order, the Court said that a properly authenticated financial statement satisfies the requirement for the production of evidence of "financial worth." The Petitioners here have met that requirement and should not be required to produce further financial information.

Your *amicus* fully endorses and supports the arguments made in this Court by the Petitioners and, for the reasons stated herein and in the Petition, respectfully urges that this Court issue the requested Writ of

Certiorari to the Seventeenth Judicial Circuit Court, Broward County, State of Florida.

Respectfully submitted,

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JANE ARPE,
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v.
LLOYD F. EARLY,
Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTEENTH JUDICIAL CIRCUIT COURT BROWARD COUNTY, STATE OF FLORIDA

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Attorneys for Petitioners

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No. 73-751

In the Supreme Court of the United States

October Term, 1973

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE,
Petitioners,
v.
LLOYD F. EARLY,
Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTEENTH JUDICIAL CIRCUIT COURT BROWARD COUNTY, STATE OF FLORIDA

STATEMENT

Petitioners filed their Petition for Certiorari on November 9, 1973, to review two orders of the Seventeenth Judicial Circuit Court, Broward County, State of Florida. The decisions denied Petitioner newspaper its Constitutional rights.

Respondent has filed a Brief in Opposition first raising certain questions as to jurisdiction. Petitioners feel constrained to file this brief as permitted by Supreme Court Rules 24.4 and 24.5.

CERTIORARI PROPERLY RUNS DIRECTLY TO THE FLORIDA TRIAL COURT

Petitioners will not comment on Respondent's Statement of the Case except to urge that the certain factual matters Respondent indicates should be brought to light are not significant nor are these facts a revelation of matters not covered in Petitioners' Statement of the Case. It is a misstatement, however, on page 3 of Respondent's Statement of the Case to claim an abandonment of Petitioners' motion to strike the claim for punitive damages. It should be noted that the petition and brief before the Florida Supreme Court were designed primarily to gain acceptance by the Florida Supreme Court of Petitioners' petition for writ of certiorari. There can be no doubt that Petitioners sought review of both of the circuit court orders of the Seventeenth Judicial Circuit. Actually, neither the District Court of Appeal, Fourth District, State of Florida, nor the Supreme Court of Florida actually considered the case on the merits. The District Court of Appeal, Fourth District, State of Florida, refused to accept certiorari. In fact, the Fourth District granted Respondent's motion to quash (Appendix "N") and on reconsideration of its order granting the motion to quash, entered its March 16, 1973, opinion (Appendix "G", Petition), refused to accept Petitioners' petition for writ of certiorari, and merely stated that the matter could be reviewed on appeal after trial.

Petitioners will continue to rely on *Interstate Circuit, Inc. v. City of Dallas, Michigan-Wisconsin Pipe Line Co. v. Calvert, American Railway Express Co. v. Levee, and Stern & Gressman,* Supreme Court Practice (page 3, Petition).

It is submitted that the Respondent is confused when he states that this Petition should not run to the trial court. While it is true that the State court decision to be reviewable must be that of the highest court of the State in which a decision could be had, this, by no means, restricts review to decisions of the highest State court; and, of course, a trial court decision is reviewable in the United States Supreme Court. In a notable recent case of this Court, certiorari was granted to review a decision of the police court of Louisville, Kentucky *(Thompson v. City of Louisville,* 1960, 362 U.S. 199). In the instant case, Petitioners sought review by certiorari in the District Court of Appeal, Fourth District, State of Florida, because such discretionary review was available and in order to exhaust its State court remedy, it was essential that such review be sought.

The review sought by Petitioners was refused by both the District Court of Appeal, Fourth District and the Supreme Court of Florida. Therefore, it is the orders of the trial court that must be taken to the United States Supreme Court. *Michigan-Wisconsin Pipe Line Co. v. Calvert* (1954) 347 U.S. 157. See also *Virginia Ry. Co. v. Mullens* (1926) 271 U.S. 220 and *Chicago & E.I.R. v. Industrial Commission of Illinois* (1932) 52 S.Ct. 151. These cases stand for the proposition that certiorari to the State trial court is proper after the State appellate courts decline to review a judgment.

THE TRIAL COURT'S ORDERS ARE REVIEWABLE BY THE UNITED STATES SUPREME COURT

Respondent seeks to persuade this Court not to accept jurisdiction with the argument that the orders involved herein are not "final". It should be noted that the decisions of this Court and, of course, since 1963, the requirement of *finality* for review of State court decisions has been relaxed. While it is certain that the decisions of this Court show a general aversion to piecemeal review, this Court must decide for itself whether the decisions of the State court are final. The effect of the decisions of the trial court are to force from Petitioner newspaper its Federal tax returns for the years 1969, 1970 and 1971, its detailed balance sheet or statement of net worth for the periods of 1969, 1970 and 1971, its profit and loss statements for 1969, 1970 and 1971. The orders complained of threaten serious injury if they are not reviewed, and as a practical matter, will not be reviewable on appeal from a final judgment following the trial *(Carondelet Canal & Navigation Co. v. Louisiana,* 1914, 233 U.S. 362). The trial court's refusal to strike the claim for punitive damages and the granting of Respondent's motion to produce are the final word of a final court, thus reviewable.

THE STATE COURT BASED ITS ORDERS UPON INSUBSTANTIAL STATE GROUNDS AND IGNORED PETITIONERS' FEDERAL RIGHTS

The Respondent appears to place great emphasis upon that portion of the Fourth District Court of Appeal order which stated that the Petitioners could appeal after the trial and after a jury verdict. Obviously, an appeal at that stage of the proceeding would be a use-

less act if the Respondent already had gained the tax returns, profit and loss statements, etc., and presumably by that time used the confidential information during the trial of the case. This Honorable Court has always been diligent in its efforts to protect First Amendment rights. Respondent certainly cannot seriously argue that this case does not involve a "federal question". In addition to the United States Constitutional provisions involved, Federal Statutes are involved. (26 U.S.C. Sec. 6103 and Sec. 7213 (a), Appendices "L" and "M", Petition).

The Petitioner newspaper, from the very outset of its attempt to resist the production of the privileged financial information has raised a "substantial" Federal question. The question is neither devoid of merit nor is it frivolous. The Federal question has been raised at every step in the proceeding in the State courts, and examination of the State court order dated August 8, 1972, wherein the court compelled broad discovery and the production of documents, shows clearly that the state grounds advanced for the decision are *insubstantial.* The order is predicated upon divorce cases and decisions clearly distinguishable from the case at bar, since this is a libel case involving the First Amendment and the *New York Times v. Sullivan* (1964) 376 U.S. 254, decision. Also, Petitioners' Motion to Strike dated August 7, 1972 (Appendix "O") and the State court's order dated August 28 denying Petitioners' motion to strike Respondent's claim for punitive damages, although not stated directly in the order, were based on the *New York Times v. Sullivan* case and its progeny, and particulary is the *Rosenbloom v. Metromedia* (1971) 403 U.S. 29, decision applicable.

It is also interesting to note in opposition to Respondent's assertion that the trial court order was based upon adequate State law that scarcely one week subsequent to the rendition by the Supreme Court of Florida of the order denying this Petitioners' petition for writ of certiorari and granting Respondent's motion to dismiss Petitioners' appeal, the District Court of Appeal, First District, State of Florida, on July 17, 1973, in *Tallahassee Democrat, Inc. v. Pogue,* 280 So.2d 512, granted petition for writ of certiorari and quashed an almost identical order of the circuit court of Leon County, Florida, wherein the trial court ordered the petitioner newspaper to produce for use by respondent the petitioner's 1971 and 1972 Federal income tax returns and its most recent profit and loss statements. The court stated as follows:

> "We think the law is well-settled in this case by the case of Spencer Ladd's, Inc. v. Lehman, et al., as found in 167 So.2d 731, from this Court, and affirmed by the Supreme Court of Florida in 182 So.2d 402, wherein the rule was laid down that evidence is permissible to allow the introduction of evidence of "financial worth" of the defendant, in cases where punitive damages are allowable.Financial worth is not synonymous to income tax returns or profit and loss statements. The purpose of punitive damages is for punishment or example as deterrent to others inclined to commit similar wrongs. The purpose of the rule of evidence is to indicate to the jury what amount, if any, a verdict would be proper to assess for punishment and at the same time not render the defendant bankrupt. *The income tax return and profit and loss statements*

would not necessarily portray a true picture of financial worth. A financial statement properly authenticated would be proper for the purpose of financial worth." (Emphasis supplied.)

Of course, Respondent was furnished sworn answers to interrogatories relating to financial circumstances and a sworn statement by its Treasurer (page 6, Petition).

In an early decision of the United States Supreme Court in the case of *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux* (1929) 49 S.Ct. 485, the Court recognized its jurisdiction on petition for writ of certiorari to inquire into whether a Federal right was denied in direct terms, but also whether or not it was denied in substance.

Mr. Justice Van Devanter delivered the opinion of the court, and on page 488 stated:

> "In the state appellate courts, the negro order relied on the Act of Congress of May 5, 1870, and its incorporation thereunder, just as it had done in the trial court, and also insisted that the decree against it was not in accord with the decision of this court in Creswill v. Knights of Pythias, 225 U.S. 246, 32 S.Ct. 822, 56 L.Ed. 1074, where like privileges asserted under that act of Congress by a fraternal and benevolent association incorporated thereunder were involved.
>
> The right thus specially set up in the state court is a federal right. Whether it was denied or

not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this court, as is done in their petition for certiorari. And it is our province to inquire, not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision having no fair support."

The Court's attention is also directed to *West Chicago Street R. Co. v. Illinois ex rel. Chicago,* (1906) 26 S.Ct. 518, where it was stated on page 521:

"The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation, -- although the opinion of the state court does not expressly refer to the Constitution of the United States, -- the judgment rejects the claims of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently either with the contract clause of the Constitution or with the clause prohibiting the state from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its nec-

essary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in Chicago, B. & Q.R. Co. v. People (recently decided) 200 U.S. 561, 50 L.ed. --, 26 Sup.Ct.Rep. 341."

THE MERE CLAIM OF PUNITIVE DAMAGES SHOULD NOT GIVE RESPONDENT THE RIGHT TO CONFIDENTIAL FINANCIAL INFORMATION

In this regard, this Court's attention is directed to the Petition previously filed and more particularly to *Federal Savings & Loan Ins. Corp. v. Krueger* (U.S.D.C. N.Ill. July 12, 1972) 41 U.S.L.W. 2040, a Federal court decision which is entirely applicable in this instance. The decision stands for the proposition quoted on page 16 of the Petition. This decision is certainly in keeping with the Federal Statutes previously cited, supra. It is also erroneous for the Respondent to assert that it is well-established in Florida jurisprudence that tax returns and profit and loss statements are discoverable. In fact, the *Tallahassee Democrat, Inc.* case rendered July 17, 1973, supra, holds contra.

THE THREAT OF A PUNITIVE DAMAGE AWARD TO A "PUBLIC OFFICIAL" OR "PUBLIC FIGURE" CONSTITUTES A SERIOUS INFRINGEMENT ON FIRST AMENDMENT RIGHTS

A free and vigorous press cannot be assured in this country if a publisher can be subjected to enormous and unpredictable fines if its publications are violative of

the principles set forth in *New York Times v. Sullivan*, supra, and subsequent cases of this Court.

In the present case, the respondent, Lloyd F. Early, County School Superintendent, is claiming "punitive" damages in addition to actual damages. He is seeking punitive damages in excess of $2,000,000.00 (Appendix "P"). It is submitted that your Petitioners, at the time of publication of the claimed libelous articles concerning Respondent's official competence, could not have foreseen what fine a jury might impose. Petitioners asked the trial court to strike the punitive damage claim (Appendix "O") and confine the Respondent to compensatory or actual damages.

In the *Rosenbloom v. Metromedia* decision of this Court (1971, 403 U.S. 29), Mr. Justice Stewart, in his dissenting opinion, expressed concern about the huge jury award of punitive damages to Mr. Rosenbloom. In the *Rosenbloom* case, the huge sum, as Mr. Justice Stewart expressed it, was not given to compensate him for any injuries but to punish Metromedia.

Of course, in the instant case, the Respondent has not pretended to limit his punitive damage claim to any reasonable amount and, in fact, asks in excess of $2,000,000.00. Justice Stewart also recognized that the manner in which unlimited discretion may be exercised is plainly unpredictable, and fear of the extensive awards that may be given under the doctrine of punitive damages must necessarily produce an impingement on freedom of the press as recognized in *New York Times*.

Justice Stewart, in page 7 of his dissenting opinion, suggests a remedy as follows:

> "The threats to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proven, actual injuries. The jury's wide ranging discretion will largely be eliminated since the award will be based on essentially, objective, discernable factors. And the self-censorship that results from the uncertainty created by the discretion as well as the self-censorship resulting from the fear of large judgments themselves would be reduced. At the same time society's interest in protecting individuals from defamation will still be fostered. The victims of the defamation will be compensated for their real injuries."

This Court is, of course, aware of Mr. Justice Black's concurring opinion in the *Rosenbloom* case. Quoting from Mr. Justice Black's opinion:

> "However, in my view, the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false. As I stated in Curtis Publishing Co. v. Butts, supra, '(I)t is time for this Court to abandon New York Times v. Sullivan and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments.' "

Respondent, in the present case, is seeking detailed financial information from Petitioner newspaper in the hope of showing enormous wealth in an effort to obtain windfall damages. Respondent makes no pre-

tense of denying his purpose. He realizes that his actual damage would be nominal. Therefore, he is concentrating his efforts on showing to the jury wealth sufficient to support a large fine.

Surely the First Amendment to the United States Constitution is intended to protect a newspaper defendant in this instance.

CONCLUSION

For the reasons set forth hereinabove and in the Petition for Writ of Certiorari, the Petition should be granted. Petitioners respectfully urge this Court to reverse the orders of the Seventeenth Judicial Circuit Court, Broward County, State of Florida, concurrently with its issuing the Writ of Certiorari.

Respectfully submitted,

JOHN F. LAW, JR.
Ryan, Taylor & Law
P. O. Box 14577
North Palm Beach, Florida
33408

Attorneys for Petitioners

APPENDIX "N"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1972
Case No. 72-859

PALM BEACH NEWSPAPERS, INC.,
etc., et al.
Petitioners,
v.
LLOYD F. EARLY,
Respondent,

OCTOBER 10, 1972.

ORDERED that Respondents' motion filed September 11, 1972 to quash petition for writ of certiorari is granted, but without prejudice to raise the same point on appeal.

A TRUE COPY
(COURT SEAL)
/s/EMMETT J. COMISKEY
CLERK
cc:
Ryan, Taylor & Law
Heuer & Albury
Farish & Farish

APPENDIX "O"

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR BROWARD COUNTY
CIVIL ACTION
Case No. 71-10447 -- Richardson

LLOYD F. EARLY,
Plaintiff,
vs.
PALM BEACH NEWSPAPERS,
INC., etc., et al.,
Defendants.

MOTION TO STRIKE

COME NOW the Defendants, by and through their undersigned attorneys, and move to strike Plaintiff's claim for punitive damages, and for grounds therefore would show:

1. That since the Supreme Court ruling in *New York Times v. Sullivan* and subsequent decisions of the Supreme Court, which have been followed by decisions of the Florida Appellate Courts involving libel actions filed by "public officials" or "public figures", the Supreme Court of the United States has defined malice in such a manner as to make the willfulness or ill will immaterial.

2. That punitive damages in "public official" or "public figure" cases have been abolished by said decisions of the United States Supreme Court.

WHEREFORE, Defendants pray that the punitive

damage claim contained in Plaintiff's Complaint be stricken.

I HEREBY CERTIFY that a copy of the foregoing has been furnished FARISH & FARISH, Attorneys for Plaintiff, 316 First Street, West Palm Beach, Florida, 33401, by hand, this 7th day of August 1972.

RYAN, TAYLOR, BOOKER & LAW
Attorneys for Defendants
P. O. Box 14577
North Palm Beach, Florida, 33408 and
HEUER AND ALBURY
Attorneys for Defendants
Suite 200, Pan-American Building
West Palm Beach, Florida, 33401
By: /s/John F. Law, Jr.
Of Counsel

APPENDIX "P"

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY.
CIVIL ACTION
NO. 70 C 3600-- Hewitt

LLOYD F. EARLY,
Plaintiff,
vs.
PALM BEACH NEWSPAPERS,
INC., a Florida corporation,
et al.,
Defendants.

COMPLAINT

NOW COMES the Plaintiff, LLOYD F. EARLY, by and through his undersigned attorneys, and sues the Defendants, PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, and alleges:

1. That the Plaintiff, at all times material herein, is a qualified educator having devoted his life to his profession, and is the duly qualified and elected Superintendent of schools for Palm Beach County, Florida, pursuant to Art. 9, para. 5 of the Constitution of the State of Florida.

2. That the Defendant, PALM BEACH NEWSPAPERS, INC., a Florida corporation, edits, publishes, distributes and sells a daily newspaper under the names of The Palm Beach Post, The Palm Beach Times and The Palm Beach Post-Times, seven days a

week, principally in Palm Beach County, and in other counties in Florida.

3. That the Defendants, FAVRE, KIRKPATRICK, SAWYER and ARPE, are residents of Palm Beach County, Florida, and employees of the Defendant, PALM BEACH NEWSPAPERS, INC., and did on various dates commencing on July 23, 1969, through and including the present time confederate and conspire among themselves and with the Defendant, PALM BEACH NEWSPAPERS, INC., in behalf of the said PALM BEACH NEWSPAPERS, INC., to edit, write, publish and distribute certain articles composed of and concerning the Plaintiff, more specifically described infra herein.

4. That said writings were false, inflammatory, inaccurate, prejudicial, misleading and defamatory language, and that said Defendants caused same to be published knowing of their falsity, or with reckless and other disregard for its truth or falsity or its prejudicial content and effect, and with reckless disregard said publications would have on the reputation and well-being of the Plaintiff.

5. That said publications made by the Defendants, done with the aforesaid malicious and wanton motive, were published and circulated in the Defendant, PALM BEACH NEWSPAPERS, INC.'s publications, and were distributed to all of said Defendant's subscribers and were sold on the newsstands throughout Palm Beach County, Florida, and the immediate adjoining counties.

6. That a copy of said publications is hereby at-

tached hereto and made a part hereof by reference being designated as Exhibits 1 through 108.

7. That the aforesaid false, unprivileged and defamatory publications, referrable to the Plaintiff, imputed conduct, characteristics or a condition incompatible with the proper exercise of his lawful business, trade, profession or office, and exposed the Plaintiff to distrust, hatred, ignominy, contempt, ridicule, humiliation and obloquy, and caused and will continue in the future to cause the Plaintiff to be avoided; and has and will in the future have a tendency to injure the Plaintiff in the proper exercise of his lawful occupation, business, employment and profession.

8. That the aforesaid publications and articles were published and distributed with malice toward the Plaintiff, and were calculated to cause and, from their natural and proximate consequence, did cause great injury to the Plaintiff in his personal, social and official business relations; and further, caused and will continue to cause him to suffer great mental and physical pain and anguish. That said damages are both temporary, continuing and permanent.

9. That on or about June 2, 1970, Plaintiff demanded in writing a retraction by the Defendant, PALM BEACH NEWSPAPERS, INC., in compliance with Chapter 770 FSA on said defamatory statements. That following receipt of Plaintiff's said demand for retraction, said Defendant did and continues to fail and refuses to comply with said demand.

WHEREFORE, Plaintiff claims compensatory damages in an amount in excess of ONE MILLION

($1,000,000.00) DOLLARS and punitive damages in an amount in excess of TWO MILLION ($2,000,000.00) DOLLARS from the Defendants, and demands trial by jury.

/s/Jos. D. Farish, Jr.
Of Counsel

FARISH & FARISH
Denco Building
316 First Street
West Palm Beach, Florida
833-7766
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 33, I certify that I have this 8 day of January, 1974, deposited in the United States mail box at North Palm Beach, Florida, with first-class postage prepaid, envelopes containing copies of the foregoing Petitioners' Supplemental Brief and appendices addressed to Hon. Jos. Farrish, Jr., Attorney for Respondent and counsel of record for him, at his office address, 316 First Street, Denco Building, West Palm Beach, Florida, 33401.

John F. Law, Jr.